91-176

Supreme Court, U.S.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

R.V. DOCTOR, [redacted] and Oregon Corporation;
GEORGE E. THOMAS AND LINDA R. THOMAS,
dba R.V. DOCTOR,
Petitioners,

v.

GENERAL ELECTRIC CAPITAL CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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QUESTIONS PRESENTED

1. Does Oregon Rule of Civil Procedure 83G(1), which grants a creditor armed with an ex parte temporary restraining order the unilateral right to indefinitely postpone a debtor's post-deprivation hearing, deprive a debtor of an interest in property without due process of law under the Fourteenth Amendment to the U.S. Constitution?

2. Does Oregon Rule of Civil Procedure 83G(1), abridge the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution on grounds that it fails to provide a debtor with a method or procedure for dissolving a creditor's ex parte temporary restraining order within an immediate and fixed time period?

3. Does Oregon Rule of Civil Procedure 83G(1), which grants a creditor the right to obtain an ex parte extension of its pre-judgment temporary restraining order seizing a debtor's personal property, deprive a debtor of an interest in property without due process of law under the Fourteenth Amendment to the U.S. Constitution?

4. Were the Petitioners deprived of a property interest without due process of law when Respondent seized Petitioners' property pursuant to Oregon Rule of Civil Procedure 83 and Petitioners were not provided with a post-deprivation hearing for sixty-six (66) days or any means to dissolve the ex parte temporary restraining order?

5. Does a creditor's conduct in invoking an unconstitutional state

procedural law constitute state action for the purposes of the Fourteenth Amendment to the U.S. Constitution, when the trial court's involvement in administering the law has been substantial?

6. If the Petitioners were deprived of a property interest without due process of law, then what are Petitioners' remedies?

LIST OF PARTIES

The parties to the proceedings below were the following: The Petitioners, George E. Thomas, doing business as R.V. Doctor; George and Linda Thomas in their individual capacity as guarantors; R.V. Doctor, Inc.; and the Respondent, General Electric Capital Corporation.

R.V. Doctor, Inc., has no subsidiaries or parent corporations. [1] R.V. Doctor was

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[1]. George Thomas, doing business as R.V. Doctor, was initially engaged exclusively in the repair of recreational vehicles. R.V. Doctor subsequently began buying, selling and leasing recreational vehicles. George Thomas considered the possibility of separating the repair department of his business from his sales department as they were conducted in separate physical locations. In the fall of 1987, George Thomas attempted to incorporate the repair department of his business as R.V. Doctor, Inc. George Thomas ultimately did not complete the incorporation of R.V. Doctor, Inc. However, at the time Respondent filed suit in Clackamas County, Oregon against George Thomas, Respondent also named R.V. Doctor, Inc. as a defendant. Both George Thomas

not an active Oregon corporation at the time of Respondent's suit to foreclose.

Prior to trial, the following Defendants were dismissed pursuant to court order and, therefore, are not named in this Petition: Chrysler First Wholesale Credit, Inc.; Coachman Industries, Inc.; Trans America Commercial Finance Corp.; FKA Borg - Warner Acceptance Corp.; Chrysler First Diversified Credit, Inc.; and ITT Commercial Finance Corp.

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and Linda Thomas were guarantors of George Thomas, dba R.V. Doctor. A judgment for judicial foreclosure was entered in favor of Respondent and against Petitioner George Thomas dba R.V. Doctor. A judgment for breach of guarantee agreement was entered in favor of Respondent and against Petitioners George Thomas and Linda Thomas.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

R.V. DOCTOR, INC. an Oregon Corporation;
GEORGE E. THOMAS AND LINDA R. THOMAS,
dba R.V. DOCTOR,

Petitioners,

v.

GENERAL ELECTRIC CAPITAL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

The Petitioners, George Thomas, dba R.V. Doctor; George Thomas and Linda Thomas, guarantors; and R.V. Doctor, Inc. respectfully pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Oregon, entered in the above entitled proceeding on the 30th of April, 1991.

OPINIONS BELOW

On April 30, 1991, the Oregon Supreme Court denied review of that decision of the Oregon Court of Appeals affirming the judgment of the Circuit Court of the State of Oregon for the County of Clackamas, Honorable Sidney A. Brockley. The Oregon Supreme Court's Order denying review is reported at General Electric Capital Corp. v. RV Doctor, Inc., 311 Or 349 (1991). The Oregon Court of Appeals' decision affirming the trial court is reported at General Electric Capital Corp. v. RV Doctor, Inc., 105 Or App 149 (1991) (decision affirmed without opinion).

JURISDICTION

The jurisdiction of this court to review the April 30, 1991 Order of the Supreme Court of the State of Oregon denying Petitioners' Petition for Review

is invoked under 28 U.S.C. § 1257, which provides as follows:

> "(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States...."

RULE 29.4(c) STATEMENT

Petitioners seeks to draw into question the validity of an Oregon state statute (ORCP 83G(1)). The State is not a party

hereto; accordingly, 28 U.S.C. § 2403(b) may be applicable.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const., amend. XVI, § 1. Citizenship; privileges and immunities; due process; equal protection.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE INVOLVED

ORCP 83G(1). Appearance; Hearing: Service of Show Cause Order; Content; Effect of Service on Person in Possession of Property.

> Subject to section B of this rule, the court shall issue an order directed to the defendant and each person having possession or control of the claimed property requiring the defendant and each

such other person to appear for hearing at a place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue. Upon request of the plaintiff the hearing date may be set later than the seventh day.

STATEMENT OF THE CASE

In the fall of 1987, Petitioner George Thomas, dba R.V. Doctor, was engaged in the business of buying, selling and repairing new and used recreational vehicles.[2] Respondent was, and still is, a financial institution primarily devoted to providing business loans to members of the general public.

On December 17, 1987, Respondent declared the Petitioners in default in the sum of $120,000 on a $300,000 line of credit Respondent had agreed to provide

[2] See footnote 1, supra.

Petitioners pursuant to the parties' 1986 inventory financing agreement.

Concurrently, on December 17, 1987, Respondent, by and through its attorney, filed an ex parte motion with the Circuit Court of the State of Oregon for the County of Clackamas for the issuance of a temporary restraining order. The motion was made pursuant to the provisions of Oregon Rule of Civil Procedure 83.[3] In its ex parte motion, Respondent requested the Court to restrain Petitioners from disposing of their inventory, accounts and assets. In addition to requesting the issuance of a temporary restraining order, Respondent also moved the Court ex parte for an order permitting the required post-deprivation show cause hearing to be set

[3] ORCP 83G is set forth in the Appendix at pp. 9-11.

later than the time period prescribed in ORCP 83G(1).

ORCP 83G(1) requires that the debtor's post-deprivation hearing be set between the third and seventh day following service of the ex parte temporary restraining order on the debtor. Under ORCP 83G(1), however, a creditor may set over the debtor's post-deprivation hearing for an unspecified period of time beyond the seventh day. The show cause hearing is the exclusive means under Oregon law whereby a debtor can dissolve a temporary restraining order issued pursuant to ORCP 83.

On December 17, 1987, the court granted the Respondent's motion for an ex parte temporary restraining order and granted the Respondent's ex parte request that the post-deprivation hearing be set beyond the

seventh day. Petitioner George Thomas was served with the temporary restraining order on the evening of December 17, 1987. Pursuant to the court order, Petitioners' assets and inventory were restrained from December 17, 1987 until January 19, 1988, the date selected by the Respondent for the post-deprivation hearing. Accordingly, an ex parte temporary restraining order was placed into effect, without a pre-deprivation or post-deprivation hearing, for thirty-three (33) days.[4]

On January 14, 1988, five days before the scheduled post-deprivation show cause hearing, Respondent's attorney orally moved the court to reset the January 19,

[4] The court's temporary restraining order is set forth in the Appendix beginning at p. 28.

1988 hearing. Respondent's counsel represented to the court that he needed additional time to complete formal discovery before the post-deprivation hearing. Over the objections of Petitioners' counsel, the Court granted Respondent's motion. The show cause hearing was rescheduled to February 23, 1988, some sixty-six (66) days following service of the ex parte temporary restraining order on the Petitioners.[5]

The trial court also denied the Petitioners' request that the Respondent obtain a larger surety bond.[6] The court had previously issued the temporary restraining order on Respondent's posting

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[5] See Transcript of the January 14, 1988 proceedings in the Appendix at pp. 39-40, 47-48, 52-54, 57 and 60-62.

[6] See Transcript of January 14, 1988 proceedings, set forth in the Appendix at pp. 61-62.

of a $10,000.00 bond. Petitioners argued to the trial court that a larger bond was necessary as Respondent had restrained inventory worth approximately $1,000,000.00 for a period of sixty-six (66) days.

After the trial court allowed the Respondent to set over the show cause hearing date until February 23, 1988, the Petitioners' other creditors elected to accelerate repayment on their inventory financing agreements. The Petitioners were naturally unable to repay all their creditors as Respondent had seized all their assets. By February 23, 1988, Petitioners were financially ruined.

Petitioners, by and through their attorney, appeared on February 23, 1988 at the scheduled post-deprivation show cause hearing to contest the validity of

Respondent's ex parte temporary restraining order. At that time, Respondent's ex parte temporary restraining order had been in effect, without an intervening post-deprivation hearing, for approximately sixty-six (66) days.

Prior to the commencement of the post-deprivation hearing, the parties appeared in chambers with the Honorable Raymond Bagley. Following discussions between counsel and Judge Bagley, the Court advised the parties that the validity of Respondent's temporary restraining order could not be decided in the time allotted by the court for the hearing as the parties intended to litigate the issue vigorously. The Court advised the parties that it could reset the show cause hearing to an unspecified future date. The Court

recommended that the parties postpone litigating issues relating to the validity of the Respondent's ex parte temporary restraining order until the time of trial.

At the Court's urging on February 23, 1988, the parties entered into a stipulated agreement.[7] Under the agreement, Respondent was allowed to take physical possession of Petitioners' new inventory and submit it to the manufacturers for repurchase.[8] The parties also agreed to litigate issues

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[7] The parties' stipulated agreement is set forth in the Appendix at p. 70.

[8] The manufacturers were contractually obligated to repurchase the Petitioners' inventory at a fixed price. At trial, the Petitioners asserted that allowing the Respondent to present the inventory to the manufacturers for repurchase was reasonable in order to mitigate against the Petitioners' potential damages. Petitioners requested damages for the equity lost as a result of the temporary restraining order.

concerning the validity of Respondent's ex parte temporary restraining order at trial with the express understanding that Petitioners would not be deemed to have waived any claims they might have to the effect that the ex temporary restraining order wrongfully restrained the Petitioners' assets. The temporary restraining order remained in effect until the time of trial.[9]

Between February 23, 1988 and the commencement of trial on April 4, 1989, several events occurred that bear on the questions presented herein.

First, Respondent disposed of Petitioners' inventory by having various units repurchased by the manufacturer and others sold at private sale. As a result

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[9] See "Order Following Provisional Process Hearing," which is set forth in the Appendix at p. 64.

of its efforts, Respondent was able to recover most of the money allegedly owed by Petitioners. Respondent claimed that a deficiency existed in the sum of $18,910. Petitioners paid the supposed deficiency, but by way of their sixth counterclaim requested the court to order Respondent to account for moneys received by selling Petitioners' inventory.

Second, Petitioners filed counterclaims for conversion, trespass to chattels, abuse of process and declaratory judgment wherein they alleged that they had been damaged as a result of the wrongful issuance of the temporary restraining order and the delay in obtaining a post-deprivation hearing. Petitioners also sought to recover damages and attorney's fees under the surety bond obtained by Respondent.

Finally, immediately prior to trial, the parties agreed to allow the trial court to bifurcate the trial proceedings so that issues pertaining to Petitioners' damages for the issuance of the temporary restraining order would not be heard unless the Petitioners first succeeded in establishing a prima facie case for liability under any of Petitioners' counterclaims or on Respondent's surety bond. Each of Petitioners' counterclaims was premised on the allegation that Respondent's ex parte temporary restraining order had wrongfully restrained Petitioners' property.

The case was tired on April 4, 1989 before the Honorable Sidney Brockley of the Circuit Court of the State of Oregon for the County of Clackamas. At trial, Petitioners proved that Respondent had in

fact been overpaid in the amount of $5,939.91. The court entered a judgment against Respondent and in favor of the Petitioners in the amount of $5,939.10. Notwithstanding the net monetary judgment in favor of the Petitioners, the court awarded Respondent $175,000 in attorney's fees. The court then offset Petitioners' judgment of $5,939.91 against Respondents award of attorney's fees.

The court awarded the Respondent its attorney's fees for several reasons. First, Respondent established that Petitioners were in fact in default on or about December 17, 1987 under the terms of the parties' inventory financing agreement. Second, the court found that Petitioners had not proved that Respondent's ex parte temporary restraining order was unlawful or

unconstitutional. The Court specifically denied the Petitioners' assertions that the ex parte temporary restraining order obtained by Respondent was constitutionally invalid.[10] Accordingly, Petitioners did not succeed on their counterclaims for trespass of chattels, conversion, abuse of process, declaratory judgment or claims for damages under Respondent's surety bond.[11]

No evidence was submitted at trial to support Petitioners' claims for damages for two reasons. First, the court rejected the Petitioners' claim that ORCP 83G(1) was unconstitutional. Second, by

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[10] The transcript of the ruling from the bench on this point is set forth in the Appendix beginning at p. 76.

[11] The court's findings of fact and conclusions of law and judgment are set forth in the Appendix at beginning at p. 90.

prior agreement, the trial proceedings were bifurcated with the issue of liability tried in advance of the issue of damages.

The Petitioners' first assignment of error on appeal to the Oregon Court of Appeals asserted that "the trial court erred as a matter of law by holding that the 66-day temporary restraining order did not violate defendant's rights to due process." The trial court had previously declared that Petitioners had in fact preserved the issue of whether the temporary restraining order was constitutionally valid or invalid for the purpose of appeal to the Oregon Court of Appeals.[12] The Oregon Court of Appeals affirmed the judgment of the trial court

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[12] The court's ruling from the bench on this point is set forth in the Appendix beginning at p. 81.

without opinion.[13] The Oregon Supreme court, without opinion, declined review of the Court of Appeals' decision.[14]

REASONS FOR GRANTING THE WRIT

I.

The decisions below sustaining the constitutional validity of Oregon Rule of Civil Procedure 83G(1) conflict with decisions of this court and raise important constitutional concerns.

Between 1969 and 1975, this court considered the constitutional validity of various state statutes which allow for the ex parte seizure and restraint of a debtor's property. See, e.g., Sniadach v. Family Finance Corp., 395 U.S. 337, 89 S.Ct. 1820, 23 L.Ed 2d 349 (1969) (prejudgment garnishment of wages statute

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[13] Appendix, p. 125.

[14] Appendix, 127.

held unconstitutional); Fuentes v. Shevin, 407 U.S. 67, 92 S.Ct. 1983, 32 L.Ed 2d 556 (1972) (Pennsylvania and Florida prejudgment replevin statutes held unconstitutional); Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1095, 40 L.Ed 2d 406 (1974) (Louisiana sequestration statute had adequate procedural safeguards to satisfy debtor's due process rights); North Georgia Finishing, Inc. v. Di Chem., Inc., 419 U.S. 601, 95 S.Ct. 719, 42 L.Ed 2d 751 (1975) (Georgia garnishment statute held unconstitutional).

Taken together, these four cases have established five (5) minimum procedural due process safeguards required of a statute that allows a creditor to obtain an ex parte temporary restraining order seizing a debtor's property. See Lewis Service Center, Inc. v. Mack Financial

Corp., 696 F.2d 66 (8th Cir. 1982). First, a temporary restraining order must issue only upon the affidavit of a creditor's attorney. The affiant(s) must have personal knowledge of facts giving rise to the issuance of the order. Second, the temporary restraining order must be signed and issued by a judge. Third, the creditor must be required to post a bond and indemnify the debtor for damages sustained by a wrongful taking. Fourth, the debtor must have the right to dissolve the order by filing a bond. Finally, the debtor must be given an immediate post-deprivation hearing at a fixed time.

Oregon Rule of Civil Procedure 83G(1) provides as follows:

> Subject to section B of this rule, the court shall issue an order directed to the defendant and each person having possession or control

> of the claimed property requiring the defendant and each such other person to appear for a hearing at a place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue. Upon request of the plaintiff the hearing date may be set later than the seventh day.

The Petitioners assert that ORCP 83G(1) has five inherent constitutional infirmities:

(1) ORCP 83G(1) allows a creditor armed with an ex parte temporary restraining order to indefinitely set over the debtor's post-deprivation hearing;

(2) The statute permits the creditor to obtain a set over of the debtor's post-deprivation hearing ex parte;

(3) Under ORCP 83G(1) a creditor may request and obtain a set over of the debtor's post-deprivation hearing without establishing that just cause exists;

(4) The statute provides the debtor with no means to dissolve the temporary restraining order, except to appear at the show cause hearing set by the creditor; and

(5) ORCP 83 G(1) does not require the trial court to rule on the validity of a creditor's temporary restraining order within a fixed period of time after the debtor's post-deprivation hearing.

Despite the existence of these constitutional infirmities, the Oregon Supreme Court and the Oregon Court of Appeals have sustained the validity of ORCP 83G(1). In taking such action, the Oregon Supreme Court and the Oregon Court of Appeals have departed from this Court's decisions in Sniadach, Fuentes, Mitchell and North Georgia Finishing. The

decisions of Oregon's appellate courts require this Court's attention.

In North Georgia Finishing v. Di-Chem, Inc., supra, for example, this Court struck down Georgia's garnishment statute on grounds that no early post-deprivation hearing was offered to the debtor. 419 U.S. at 607. This Court distinguished Mitchell v. W.T. Grant Co., where it had upheld Louisiana's sequestration statute, on grounds that Louisiana's law, among other things, "expressly entitled the debtor to an immediate hearing after seizure and to dissolution of the writ absent proof by the creditor of the grounds on which the writ was issued." Id.

This Court's decision in Barry v. Barchi, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed 2d 365 (1979) is also in conflict with the decisions below. In Barry, this

Court invalidated a New York statute authorizing the suspension of harness racing licenses on grounds that the licensee was not afforded an immediate and prompt post-deprivation hearing. The appellee, John Barchi, trained harness race horses. Officials of the New York State Racing and Wagering Board suspended Barchi's license for 15 days upon finding his horse had been drugged.

Under New York Unconsol. Laws § 8022 (McKinney 1979), a suspended licensee was entitled to a post-suspension hearing. The suspension remained in effect until the time of the hearing as there was no alternative method to dissolve the suspension order. Id. at 62. The New York statute also granted the Wagering Commission the right to obtain a continuance of Barchi's suspension hearing

without cause. Id. This Court ultimately concluded that the New York statute, on its face and as applied, failed to assure a prompt proceeding and prompt disposition of the outstanding issue between Barchi and the state. This Court held New York's law unconstitutional on grounds that due process under the Fourteenth Amendment requires an opportunity to be heard "at a meaningful time and in a meaningful manner." Id. at 66 (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 1192, 14 L.Ed 2d 62 (1965).

Lower courts have also found that a delay in granting a debtor a prompt post-deprivation hearing violates the debtor's due process rights. In Neeley v. Sentry Finance Co. of Arizona, 606 F. Supp. 453 (D. Ariz. 1985), the United States District Court for the District of Arizona

held that Arizona's post-judgment garnishment statute violated the Due Process Clause of the Fourteenth Amendment as the statute permitted the trial court to continue the post-deprivation hearing, for cause, on any terms the court considered appropriate. The U.S. District Court concluded that the statute was unconstitutional on grounds that an Arizona trial court could conceivably put off the post-deprivation hearing for an indefinite period of time.

Likewise, in Cristiano v. Courts of The Justices of the Peace, 669 F. Supp. 662 (D. Del. 1987), the Delaware District Court held that Delaware's attachment statute was constitutionally defective as it did not provide a mandatory time period for a hearing on the merits of the restraining order. Id. at 671. A similar

result was reached in Garrison Memorial Hosp. v. Rayer, 543 N.W. 2d 787 (N. D. 1990). In Garrison, the North Dakota Supreme Court invalidated the state attachment statute on grounds that it did not guarantee a debtor a hearing after the execution of an ex parte prejudgment writ of attachment. Finally, in Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980), the Third Circuit Court of Appeals struck down Pennsylvania's post-judgment garnishment procedures. The court found that Pennsylvania's garnishment law, which permitted creditors to take 15 days to respond to a petition to set aside a garnishment, did not require a hearing with sufficient promptness to satisfy a debtor's due process rights under the Fourteenth Amendment to the United States Constitution.

In Huntington v. Coffee Associates, 43 Or App 595, 603 P.2d 1183 (1979) the Oregon Court of Appeals had the opportunity to review the constitutional validity of the predecessor to ORCP 83G, Oregon Revised Statute (ORS) 29.065(1). et seq. At that time, ORS 29.065(1) provided as follows:

> Subject to ORS 29.030, the court shall issue an order directed to the defendant and each person having possession or control of the claimed property requiring the defendant and each such other person to appear for a hearing at a place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue.

The court in Huntington concluded that this statutory scheme met the requirements of due process as enunciated by this Court in Fuentes v. Shevin, and Sniadach v. Family Finance Corp. Id. at 607.

In 1981, however, the Oregon legislature codified the majority of Oregon's provisional process laws into the Oregon Rules of Civil Procedure. ORCP 83G(1) was enacted and replaced ORS 29.065.

When ORCP 83G(1) was enacted, the provisions of former ORS 29.065(1) were amended. A sentence was inserted into ORCP 83G(1) that grants a creditor a right to obtain an ex parte continuance of the post-deprivation hearing with or without cause. ORCP 83G(1) permits a creditor obtaining an ex parte temporary restraining order to request the court to set over the post-deprivation hearing beyond the seventh day after service of the order on the debtor. The Oregon Court of Appeals in Huntington v. Coffee Associates, supra, did not examine the

constitutionality of Oregon's replevin statute with the provision that allows a creditor to continue the debtor's post-deprivation hearing for an indefinite period of time.

In sum, the Petitioners assert that the decisions below conflict with this Court's prior decisions in Sniadach, Fuentes, Mitchell and North Georgia Finishing, Inc. Under ORCP 83G(1), a creditor may indefinitely set over the debtor's post-deprivation show cause hearing. Moreover, a set over may be obtained by the creditor ex parte and with or without cause. Finally, the trial court has an indefinite period of time to rule on the validity of the temporary restraining order. On its face and as applied, therefore, ORCP 83G(1) fails to provide a debtor with a meaningful hearing within a fixed time

immediately following the initial seizure or restraint of the debtor's property.

II.

If ORCP 83G(1) is unconstitutional and Petitioners were deprived of property without due process of law, this Court should remand this case for a determination of Petitioners' damages pursuant to the Petitioners' state law claims.

In Lugar v. Edmondson Oil Co., 457 U.S. 922, 102 S.Ct. 2744, 73 L.Ed 2d 482 (1982), this Court held that when a private party invokes an unconstitutional state procedural law, that conduct may constitute "state action" for purposes of the Fourteenth Amendment to the United States Constitution. Furthermore, if the trial court's involvement in implementing the law is substantial enough, then the

Due Process Clause is implicated. Tulsa Professional Collection Services v. Pope, 485 U.S. 478, 108 S. Ct. 1340, 99 L. Ed. 2d 565 (1988); Dieffenbach v. Attorney General of Vermont, 694 F.2d 187 (2nd Cir. 1978). Petitioners assert that if ORCP 83G(1) is unconstitutional, the trial court's involvement in administering the provisions of ORCP 83G is substantial enough in this case to implicate the Due Process Clause.[15]

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[15] The trial court's involvement here has been substantial. First, the trial court originally granted Respondent's ex parte motion to set the show cause hearing beyond the seventh day. Second, the trial court granted the Respondent's request to set over the post-deprivation hearing date despite Petitioners' objection. Third, the trial court granted Respondent's ex parte request to post a $10,000 surety bond to restrain collateral worth approximately $1,000,000 and subsequently denied Petitioners' request to increase the amount of the bond. Finally, the trial court exercised its discretion to indefinitely continue the hearing date and to postpone ruling on a Petitioners'

If a debtor has been deprived of property without due process of law, the debtor may bring an action under 42 U.S.C. §1983. A 42 U.S.C. § 1983 claim is not the exclusive remedy for redressing a constitutional violation. In Parratt v. Taylor, 451 U. S. 527, 535, 101 S. Ct. 1908, 88 L.Ed. 2d 420 (1981), this Court held that a party does not have a 42 U.S.C. §1983 claim if adequate state law remedies exist.

Here, the Petitioners assert that adequate state law remedies were available to Petitioners and were raised in the trial court proceedings. If this Court determines that the Petitioners were deprived of their property without due process of law, the Petitioners also assert that they are entitled to relief

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objections.

under Oregon law, despite the fact that they were determined to be in default on their line of credit.

It is well-established that a party deprived of property without due process of law is entitled to at least nominal damages. Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L.Ed. 2d 252 (1978). This Court has recognized that compensatory damages are also available to a party deprived of an interest in property without due process of law, provided the party is able to establish a causal link between the procedural defect and their alleged damages. 435 U.S. at 255.

Furthermore, in 42 U.S.C. § 1983 actions, it is appropriate to award compensatory damages for emotional and mental distress and punitive damages to a

party deprived of procedural due process where the creditor exhibits reckless disregard of a debtor's constitutional rights. Guzman v. Western State Bank of Devils Lake, 540 F.2d 948 (8th Cir. 1976). The Petitioners assert that Oregon law allows for the recovery of nominal and compensatory damages, punitive damages, and reimbursement for reasonable attorney's fees and costs. The fact that the debtor is in default does not preclude the debtor from recovering damages for the unconstitutional seizure or restraint of the debtor's property. Id.

Here, the Petitioners raised several state law claims which sought relief for the deprivation of their property without due process of law, under theories of conversion, trespass to chattels, and abuse of process. Moreover, the

Petitioners requested that they be awarded compensatory damages and reasonable attorney's fees and costs under the Respondent's surety bond.[16]

The trial court did not reach the issue of the Petitioners' damages because the proceedings were bifurcated and the court made a preliminary finding that the Petitioners had failed to establish that the restraining order was unconstitutional or wrongfully restrained the Petitioners. If the Respondent acted in accord with an unconstitutional rule of procedure to restrain Petitioners' property, this

[16] ORCP 82B, which is set forth in the Appendix at p. 19, provides for an action on a surety bond upon motion without necessity of independent action. The issue of whether Petitioners were entitled to damages on the Respondent's surety bond was continued from the February 23, 1988 show until the time of trial. See "Stipulation," which is set forth in the Appendix beginning at p. 70.

matter should be remanded to determine whether or not Petitioners are entitled to recover damages under their common law claims for conversion, trespass to chattels, abuse of process, declaratory judgment, and action on the bond. Accordingly, a second reason for granting a Writ in this matter is that if this Court determines that Petitioners have been deprived of a property interest without due process of law, this case must be remanded for a determination of Petitioners' allowable damages under state law.

III.

Specific reasons exist for granting this Writ of Certiorari that have importance beyond this case.

There are specific reasons for granting this Writ of Certiorari that have importance beyond this case.

First, if the constitutionality of ORCP 83G(1) is upheld, a creditor in Oregon can procure a thirty-three (33) day ex parte temporary restraining order seizing a debtor's assets without being required to establish good cause why the post-deprivation hearing should not be held within three (3) to seven (7) days.

Second, if ORCP 83G(1), as applied in this matter, is declared to be constitutionally valid, then an Oregon creditor may procure an ex parte sixty-six (66) day temporary restraining order

by simply requesting a set over on grounds that the creditor needs more time to complete discovery.

Third, unless ORCP 83G(1) is declared unconstitutional on its face, and as applied in this case, a trial court may effectively set over the show cause hearing date for an indefinite period of time. Debtors will have no means to dissolve the temporary restraining order until a hearing is eventually provided.

Finally, if the decision of the Oregon Supreme Court is upheld, creditors will be able to use the statute to put debtors out of business or extract financial concessions that would not otherwise be proper or permissible. Debtors who are in default, but nevertheless have sufficient assets to repay their creditors, may have their businesses unnecessarily liquidated

if the creditor obtains an indefinite restraining order seizing all the debtor's assets.

CONCLUSION

For all the reasons presented herein, this petition for Writ of Certiorari should be granted. The decisions of the Oregon Supreme Court and Oregon Court of Appeals, sustaining the validity of ORCP 83G(1), are in conflict with the decisions of this court in Mitchell v. W.T. Grant Co., 416 U.S. 600, 94 S.Ct. 1095, 40 L.Ed. 2d 406 (1974) and Barry v. Barchi, 443 U.S. 55, 99 S.Ct., 62 L.Ed. 2d 365 (1979). On its face, and as applied, Oregon Rule of Civil Procedure 83G(1) does not comport

with the procedural due process required by the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

/s/ Gary M. Bullock

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APPENDIX

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RULE 83. PROVISIONAL PROCESS

A. **Requirements for Issuance.** To obtain an order for issuance of provisional process the plaintiff shall cause to be filed with the clerk of the court from which such process is sought a sworn petition and any necessary supplementary affidavits requesting specific provisional process and showing, to the best knowledge, information, and belief of the plaintiff or affiant, that the action is one in which provisional process may issue, and:

A(1) The name and residence or place of business of the defendant;

A(2) Whether the underlying claim is based on a consumer transaction and whether provisional process in a consumer good is sought;

A(3)(a) If the provisional process sought is claim and delivery, a description of the claimed property in particularity sufficient to make possible its identification, and the plaintiff's estimate of the value and location of the property;

A(3)(b) If the provisional process sought is a restraining order, a statement of the particular acts sought to be restrained;

A(4) Whether the plaintiff's claim to provisional process is based upon ownership, entitlement to possession, a security interest or otherwise;

A(5) A copy or verbatim recital of any writing or portion of a writing, if plaintiff relies upon a writing, which evidences the origin or source of the plaintiff's claim to provisional process;

A(6) Whether the claimed property is wrongfully detained by the defendant or another person;

A(7) Whether the claimed property has been taken by public authority for a tax, assessment, or fine;

A(8) If the plaintiff claims that the defendant has waived the right to be heard, a copy of the writing evidencing such waiver and a statement of when and in what manner the waiver occurred;

A(9) If provisional process is based on notice of a bulk transfer under ORS chapter 76 or a similar statute or provision of law, a copy of the notice;

A(10) Facts, if any, which tend to establish that there is a substantial danger that the defendant or another person is engaging in, or is about to engage in, conduct which would place the

claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser;

A(11) Facts, if any, which tend to establish that without restraint immediate and irreparable injury, damage, or loss will occur;

A(12) Facts, if any, which tend to establish that there is substantial danger that the defendant or another person probably would not comply with a temporary restraining order; and

A(13) That there is no reasonable probability that the defendant can establish a successful defense to the underlying claim.

B. **Provisional Process Prohibited in Certain Consumer Transactions.** No court shall order issuance of provisional

process to effect attachment of a consumer good or to effect attachment of any property if the underlying claim is based on a consumer transaction. Provisional process authorized by Rule 85 may issue in consumer transactions.

C. **Evidence Admissible, Choice of Remedies Available to Court.**

C(1) The court shall consider the affidavit or petition filed under section A of this rule and may consider other evidence including, but not limited to, and affidavit, deposition, exhibit, or oral testimony.

C(2) If from the affidavit or petition or other evidence, if any, the court finds that a complaint on the underlying claim has been filed and that there is probable cause for sustaining the validity of the underlying claim, the court shall consider

whether it shall order issuance of provisional process, as provided in section D or E of this rule, or a restraining order, as provided in section F of this rule, in addition to a show cause order. The finding under this subsection is subject to dissolution upon hearing.

D. **Effect of Notice of Bulk Transfer.** Subject to section B of this rule, if the court finds that with respect to property of the defendant notice of bulk transfer under ORS chapter 76 or a similar statute or provision of law has been given and that the time for possession by the transferee has not passed, the court shall order issuance of provisional process.

E. **Issuance of Provisional Process Where Damage to Property Threatened.** Subject to section B of this rule, if the

court finds that before hearing on a show cause order the defendant or other person in possession or control of the claimed property is engaging in, or is about to engage in, conduct which would place the claimed property in danger of destruction, serious harm, concealment, removal from this state, or transfer to an innocent purchaser or that the defendant or other person in possession or control of the claimed property would not comply with a temporary restraining order, and if Rule 82A has been complied with, the court shall order issuance of provisional process in property which probably would be the subject of such destruction, harm, concealment, removal, transfer, or violation. Where real property is subject to provisional process as provided by this section, the plaintiff shall have recorded

in the County Clerk Lien Record a certified copy of that order.

F. **Restraining Order to Protect Property.** Subject to section B of this rule, where hearing on a show cause order is pending or where the court finds that because of impending injury, destruction, transfer, removal or concealment of the property in which provisional process is sought there is probable cause to believe that immediate and irreparable injury, damage, or loss to the plaintiff is imminent, and if Rule 82A has been complied with, the court in its discretion may issue a temporary order directed to the defendant and each other person in possession or control of the claimed property restraining the defendant and each such other person from injuring, destroying, transferring, removing, or

otherwise disposing of property and requiring the defendant and each such other person to appear at a time and place fixed by the court and show cause why such restraint should not continue during pendency of the proceeding on the underlying claim. Such order shall conform to the requirements of Rule 79D. A restraining order under this section does not create a lien.

G. **Appearance; Hearing, Service of Show Cause Order; Content; Effect of Service on Person in Possession of Property.**

G(1) Subject to section B of this rule, the court shall issue an order directed to the defendant and each person having possession or control of the claimed property requiring the defendant and each such other person to appear for

hearing at a place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue. Upon request of the plaintiff the hearing date may be set later than the seventh day.

G(2) The show cause order issued under subsection (1) of this section shall be served on the defendant and on each other person to whom the order is directed.

G(3) The order shall:

G(3)(a) State that the defendant may file affidavits with the court and may present testimony at the hearing; and

G(3)(b) State that if the defendant fails to appear at the hearing the court will order issuance

of the specific provisional process sought.

G(4) If at the time fixed for hearing the show cause order under subsection (1) of this section has not been served on the defendant but had been served on a person in possession or control of the property, and if Rule 82A has been complied with, the court may restrain the person so served from injuring, destroying, transferring, removing, or concealing the property pending further order of the court or continue a temporary restraining order issued under section F of this rule. Such order shall conform to the requirements of Rule 79D. Any restraining order issued under this subsection does not create a lien.

H. **Waiver; Order Without Hearing.** If after service of the order issued under

subsection G(1) of this rule, the defendant by a writing executed by or on behalf of the defendant after service of the order expressly declares that defendant is aware of the right to be heard and does not want to be heard, that defendant is aware of the right to be heard and does not want to be heard, that defendant expressly waives the right to be heard, that defendant understands that upon signing the writing the court will order issuance of the provisional process sought so that the possession or control of the claimed property will be taken from the defendant or another person, the court, subject to section B of this rule without hearing shall order issuance of provisional process.

I. Authority of Court on Sustaining Validity of Underlying Claim; Provisional Process; Restraining Order.

I(1) Subject to section B of this rule, if the court on hearing on a show cause issued under section G of this rule finds that there is probable cause for sustaining the validity of the underlying claim and if Rule 82A has been complied with, the court shall order issuance of provisional process. The order shall describe with particularity the provisional process which may be issued.

I(2) Subject to section B of this rule, if the court on hearing on a show cause order issued under section G of this rule finds that there is probable cause for sustaining the validity of the underlying claim but that the provisional process sought cannot properly be ordered,

and if Rule 82A has been complied with, the court in its discretion may continue or issue a restraining order of the nature described in section F of this rule. If a restraining order is issued, it shall conform to the requirements of Rule 79D. A restraining order under this subsection does not create a lien.

RULE 82. SECURITY; BONDS AND UNDERTAKINGS; JUSTIFICATION OF SURETIES

A. Security Required.

A(1) Restraining Orders; Preliminary Injunctions.

A(1)(a) No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs, damages, and attorney fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

A(1)(b) No security will be required under this subsection where:

A(1)(b)(i) A restraining order or preliminary injunction is sought to protect a person from

violent or threatening behavior; or

A(1)(b)(ii) A restraining order or preliminary injunction is sought to prevent unlawful conduct when the effect of the injunction is to restrict the enjoining party to available judicial remedies.

A(2) Receivers. No receiver shall be appointed except upon the giving of security by the receiver in such sum as the court deems proper for the payment of any costs, damages, and attorney fees as may be sustained or suffered by any party due to the wrongful act of the receiver.

A(3) Attachment or Claim and Delivery.

A(3)(a) Before any property is attached under Rule 84 or taken by the sheriff under Rule 85, the plaintiff must file with the clerk a surety bond,

in an amount fixed by the court, and to the effect that the plaintiff will pay all costs that may be adjudged to the defendant, and all damages which the defendant may sustain by reason of the attachment or taking, if the same be wrongful or without sufficient cause, not exceeding the sum specified in the bond.

A(3)(b) Upon motion by the defendant and showing that defendant's potential costs or damages exceed the amount of the bond, the court may require the plaintiff to give additional security.

A(3)(c) No bond shall be required before property is taken by the sheriff under Rule 85 if the court, in the order authorizing issuance of provisional process, finds that the

claim for which probable cause exists is that defendant acquired the property contrary to law.

A(4) Other Provisional Process. No other provisional process shall issue except upon the giving of security by the plaintiff in such sum as the court deems proper, for payment of such costs, damages, and attorney fees as may be incurred or suffered by any party who is wrongfully damaged by such provisional process.

A(5) Form of Security or Bond. Unless otherwise ordered by the court under subsection (6) of this section, any security or bond provided for by these rules shall be in the form of a security bond issued by a corporate surety qualified by law to issue surety insurance as defined in ORS 731.186.

A(6) Modification of Security Requirements by Court. The court may waive, reduce, or limit any security or bond provided by these rules, or may authorize a non-corporate surety bond or deposit in lieu of bond, or require other security, upon an ex parte showing of good cause and on such terms as may be just and equitable.

B. **Security; Proceedings Against Sureties.** Whenever these rules or other rule or statute require or permit the giving of security by a party, and security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as such surety's agent upon whom any papers affecting the surety's liability on

the bond or undertaking may be served. Any surety's liability may be enforced on motion without the necessity of any independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

C. **Approval by Clerk.** Except where approval by a judge is otherwise required, the clerk is authorized to approve all undertakings, bonds, and stipulations of security given in the form and amount prescribed by statute, rule, or order of the court, where the same are executed by a corporate surety under subsection D(2) of this rule.

D. **Qualifications of Sureties.**

D(1) Individuals. Each individual surety must be a resident of the state. If there is one individual surety, that surety must be worth twice the sum specified in the undertaking, exclusive of property exempt from execution, and over and above all just debts and liabilities; where there is more than one individual surety, each may be worth a lesser amount if the total net worth of all of them is equal to twice the sum specified in the undertaking. No attorney at law, peace officer, clerk of any court, or other officer of any court is qualified to be surety on the undertaking.

D(2) Corporations. A corporate surety must be qualified by law to issue surety insurance as defined in ORS 731.186.

E. Affidavits of Sureties.

E(1) Individuals. The bond or undertaking must contain an affidavit of each surety which shall state that such surety possesses the qualifications prescribed by section D of this rule.

E(2) Corporations. The bond or undertaking of a corporate surety must contain affidavits showing the authority of the agent to act for the corporation and stating that the corporation is qualified to issue surety issuance as defined in ORS 731.186.

E(3) Service. When a bond or undertaking is given for the benefit of a party, a copy of such bond or undertaking shall be served on that party promptly in the manner prescribed in Rule 9A. Proof of service thereof shall thereupon be

filed promptly in the court in which the bond or undertaking had been filed.

F. **Objections to Sureties.** If the party for whose benefit a bond or undertaking is given is not satisfied with the sufficiency of the sureties, that party may, within 10 days after the receipt of a copy of the bond, serve upon the party giving the bond, or the attorney for the party giving the bond, a notice that the party for whose benefit the bond is given objects to the sufficiency of such sureties. If the party for whose benefit the bond is given fails to do so, that party is deemed to have waived all objection to the sureties.

G. **Hearing on Objections to Sureties.**

G(1) Request for hearing. Notice of objections to a surety as provided in section F of this rule shall be filed in

the form of a motion for hearing on objections to the bond. Upon demand of the objecting party, each surety shall appear at the hearing of such motion and be subject to examination as to such surety's pecuniary responsibility or the validity of the execution of the bond. Upon hearing of such motion, the court may approve or reject the bond as filed or required such amended, substitute, or additional bond as the circumstances will warrant.

G(2) Information to Be Furnished. Sureties on any bond or undertaking shall furnish such information as may be required by the judge approving the same.

G(3) Surety Insurers. It shall be sufficient justification for a surety insurer when examined as to its qualifications to exhibit the certificate

or authority issued to it by the Insurance Commissioner or a certified copy thereof.

ORS 29.065 provides:

"(1) Subject to ORS 29.030, the court shall issue an order directed to the defendant and each person having possession or control of the claimed property requiring the defendant and each such other person to appear for hearing at a place fixed by the court and at a fixed time after the third day after service of the order and before the seventh day after service of the order to show cause why provisional process should not issue.

"(2) The show cause order issued under subsection (1) of this section shall be served personally on the defendant and on each other person to whom the order is directed.

"(3) The order shall:

"(a) State that the defendant may file affidavits with the court and may present testimony at the hearing; and

"(b) State that if the defendant fails to appear at the hearing the court will order issuance of the specific provisional process sought.

"(4) If at the time fixed for hearing the show cause order under subsection (1) of this section has not been served on the defendant but has been served on a person in possession or control of the property, the court may restrain the person so served from injuring, destroying, transferring, removing or concealing the property pending further order of the court."

IN THE CIRCUIT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

GENERAL ELECTRIC CREDIT CORPORATION, a foreign corporation,	)	No. 87-12-213
Plaintiff,	)	TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE
v.	)	
R.V. DOCTOR, INC., an Oregon corporation, and GEORGE E. THOMAS and LINDA R. THOMAS, dba R.V. DOCTOR,	)	
Defendants.	)	

THIS MATTER came regularly before the undersigned judge of the above-entitled court upon plaintiff's sworn petition for a temporary restraining order and order to show cause.

THE COURT FINDS that a complaint has been filed on plaintiff's underlying claim; and

THE COURT FURTHER FINDS that plaintiff has requested that the show cause hearing

date may be set later than as prescribed by ORCP 83G(1); and

THE COURT FURTHER FINDS that hearing on a show cause order is pending or that, because of impending injury, destruction, transfer, removal or concealment of the property in which provisional process is sought, there is probably cause to believe that immediate and irreparable injury, damage or loss to plaintiff is imminent; and

THE COURT FURTHER FINDS that plaintiff has given security by way of a bond in the amount of [$10,000.00] for the payment of such costs, damages and attorney fees as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained, and that such sum is deemed to be proper by the court;

NOW, THEREFORE, IT IS HEREBY ORDERED that defendants, and their officers, agents, servants, employees and attorneys, and those persons in active concert or participation with any of them who receive actual notice of this order by personal service or otherwise, are hereby restrained from and against any and all efforts and actions to sell, transfer, alienate, encumber, move, relocate, dismantle or alter all or any of the following property, or any part or portion thereof, until further order of this court, with the word "defendants" referring to George E. Thomas and Linda R. Thomas, and, to the extent it has acquired their business or business assets, R.V. Doctor, Inc.:

(a) All goods delivered to defendants by anyone under consignments which are not security interests;

(b) All of defendants' inventory, wherever located, and whether new, used or repossessed (including but not limited to, mobile homes, manufactured homes, modular homes, motor homes, trailers, camper units and recreational vehicles) and equipment or intended for use in connection therewith, including the property listed in Exhibit 1 attached hereto and incorporated herein by reference as if fully set forth;

(c) Defendants' accounts, contract rights documents, instruments, accounts receivable, general intangibles, chattel paper and books and records;

(d) Any such property returned to or repossessed by or on behalf of defendants;

(e) Any such property as may be after-acquired property;

(f) Any and all accessions to, substitutions for, products and proceeds of any such property.

IT IS FURTHER ORDERED that defendants shall appear before this court in Room [104], of the Clackamas County Courthouse, at Oregon City, Oregon, at [1:30 p].m., on [January 19, 1988], to show cause, if any they have, why they should not be required to forthwith deliver the foregoing property to plaintiff or to the sheriff of Clackamas County for delivery to plaintiff at a time and place established by the court, and further to show cause why the foregoing restraining order should not be continued until that has been accomplished.

The defendants may file affidavits with the court and may present testimony at such hearing. If the defendant fails to appear at such hearing, the court will order issuance of the special provisional process sought.

It is so ordered this [17th] day of December, 1987.

[Raymond R. Bagley, Jr.]
Circuit Court Judge

Submitted by:
Thomas A. Gerber
Attorney for Plaintiff

IN THE CIRCUIT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

GENERAL ELECTRIC CREDIT CORPORATION, a foreign corporation,	)	No. 87-12-213
Plaintiff,	)	
v.	)	
R.V. DOCTOR, INC., an Oregon corporation, and GEORGE E. THOMAS and LINDA R. THOMAS, dba R.V. DOCTOR,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDING

January 14, 1988

BOB BAUMANN
Official Court Reporter
204 Clackamas County Courthouse
Oregon City, Oregon 97045
655-8683

Be it remembered that the previously entitled matter came on regularly for hearing before the Honorable Charles A. Sams, Circuit Court Judge, on Thursday, the 14th day of January, 1988, at the Clackamas County Courthouse, Oregon City, Oregon.

APPEARANCES:

Mr. Thomas Gerber, Attorney at Law, appearing in behalf of the plaintiff;

Mr. Wade Regier, Attorney at Law, appearing in behalf of the Defendants.

PROCEEDINGS:

THE COURT: You gentlemen must be here on GECC versus R.V. Doctor. This matter is set for the 19th --

MR. REGIER: Yes, Your Honor, 1:30 show cause.

THE COURT: We're here, basically, then, on the motion for expedited discovery.

MR. GERBER: That's correct, Your Honor. If Your Honor will -- Tom Gerber appearing for the plaintiff in this case. If Your Honor would recall, I attempted to present this particular motion to the Court right after the first of the year at ex parte time.

As a matter of courtesy to counsel, I told him in advance I'd be doing that. He appeared and objected and wanted to have the fourteen days provided by ORCP in

which to file objections. Today is day fifteen on that.

We did have a telephone conference with Judge Gilroy earlier about whether this really needed to be set on the motion docket. And we tried to resolve things. We were unable to do so.

Your Honor did not want to rule on it as much as he was objecting to it on the ex parte docket. And you said the only way it was going to get resolved, put it up as a regular motion and get it scheduled. So, basically, here we are.

Now, I did receive from Mr. Regier, when I came in today, apparently some discovery that he wants as well in the form of two depositions. He's got a motion for expedited discovery. I have no idea if it's going to be filed. I'm not

going to insist any fourteen days under ORCP if expedited discover is appropriate.

The request for production of documents, which I assume that Mr. Regier is going to intend to have heard today, I'm at a little bit of a disadvantage. I haven't had time to review it.

As far as our motion is concerned, we have attempted to limit the discovery sought, Your Honor, to the issues that appear to be framed by the comments of counsel and other parties to this particular situation.

The case involves a recreational vehicle, travel trailer, motor home dealer who is found to be out of trust to the tune of $121.000.00 worth of advance invoices on six, I think it's a mixture of motor homes and travel trailers. My client, General Electric Credit

Corporation is provided the inventory financing. And when we discovered this, we were told they had been sold.

We were not given access - kicked off the lot - not given access to the books and records to try to find out what is going on. Ever since that time, we've been trying to get access to the records and no opportunity to inspect the lot.

Now, we are not seeking full discovery. It is reasonably tailored to what I think our purposes are going to be for the show cause hearing. The difficulty we have with the passage of time and the scheduling of every one concerned, I don't think we're going to be able to get together on the 19th. This was discussed with Judge Gilroy a week or ten days ago when we had the telephone conference. In any event, -- so I will be asking for a

continuance of the show cause hearing as well.

But in terms of the discovery, we're seeking -- number one, we are seeking an inspection of the dealer's lot, and this pertains to what's going to be coming up at the show cause hearing. There's always a concern under these circumstances parties will be complying with the restraining order should the Court to continue restraining orders.

Additionally, there's some question whether all is there and whether or not some of the property covered by the restraining order may already have been removed after the restraining order was served. And there are conflicting rumors and scuttlebutt, we're unable to get any information from the defendant's in any other fashion.

Number two, we have asked for production and the opportunity to inspect and copy as necessary six categories of documents. And while the lawyer's terminology in the request for production has been served is, I think, probably normally lawyer like, they fall into six readily identifiable categories:.

Number one, we want the documents pertaining to the six out-of-trust sales. We need to trace those transactions.

WE need to find out any proceeds remaining available that served as a part of our collateral.

We need to determine whether the actual or purported purchasers, whoever they might be, have rights in those units that are superior to the rights of General Electric Credit Corporation. We cannot

resolve those questions without this discovery.

I have attempted already through the Department of Motor Vehicles using the identification numbers to try to find that out. They somehow, in their computer, with one exception, none of these had showed up on the computer so I have no idea, with one exception, who they were sold to, the circumstances, if all the money has been paid or if more money is yet to come and so on and so forth.

The second category that we're looking for is the documents pertaining to the acquisition, transfer or sale of inventory that GECC did not finance for this dealer. There are other inventory lenders. There are some disputes and some rights that have already been asserted as to priority. We're attempting to sort those out. It

does appear we may have priority as to some of the units, as to some of the other lenders.

Obviously in the original process we're seeking delivery for immediate possession. For us for purposes of our underlying remedies we've got to get those sorted out before the hearing now set for the 19th. Excuse me, I also understand that some of the other units that we did not finance are not the subject of anyone else lending either but are apparently trade-ins or something. And we may well have a security interest in those units not subject to any prior interest. And we, again, need to get that sorted out.

The third, we have asked for copies of all security agreements with anybody pertaining to the inventory and other collateral. Again to sort out the

conflicting security interest claims or the claims that are conflicting security interest.

Fourth, we have asked for documents pertaining to any sales or transfer of the units that we had financed that are still on the lot. There have been some cases with some of those may be the subject of a present sale. If that is the case, it may well be that those sales should be consummated fairly quickly and expeditiously to generate the most benefit for all concerned.

We cannot identify this information without -- we cannot identify these situations and find out how things stand without this sort of information.

Fifth, consignment documents. I understand some of the units that are out there may have been consigned under

Article 9 of the UCC code. General Electric Credit Corporation may have a security interest in consigned units that is superior to the rights of the consignors. We cannot tell until we get to the bottom of it.

The restraining order covers units that were consigned, as well. And if we can sort out who has the prior rights we can dispense with that.

I already have one customer who has consigned his units -- or a motor home for sale and I, frankly, it appears, that his interest may well be superior because of the operation of Article 9 of the Uniform Commercial Code. We need to know whatever is known from their consignments.

Lastly, we have in our possession a large grouping of keys to the various units that were on the lot, or some of

them. And they're not identified by specific description of unit body identification number, they're identified by stock number. If there's any kind of a list to help us sort those out, it's going to be important. They want the key to one unit because it's getting water damage, or something like that. And I don't even know what key to give them.

I've asked and Mr. Regier is apparently unable to get the information from his client.

Those are the documents that we're seeking, Your Honor. I do not think it's going to take a great deal of time.

What it boils down to are the so-called, in the trade, deal files which is typically an eight-and-a-half-by-eleven envelope of all the transactions for particular work or completed sales are

placed in, as well as the files for the individual financed unit -- individual inventory units which both dealerships keep a separate file for each unit and, of course, key list, security agreement that will pretty much cover this.

THE COURT: You want this set over -- it's currently scheduled for next Tuesday at 1:30 on the 19th. You're asking that be continued for how long?

MR. GERBER: I don't see how we're going to avoid it. I had scheduled the inspections of the lot and the documents for earlier this week. You Know we couldn't get it before you until today.

THE COURT: I concur you may need it. I'm asking how long you're asking for?

MR. GERBER: Well, I think that's going to be a function of the docket clerk's office, Your Honor. At this point --

THE COURT: Answer my question. I'm asking what you want. If you had your druthers, a week, two weeks, a month?

MR. GERBER: I would need about two and a half weeks, Your Honor. I have a three-day jury trial that starts on the 22nd.

THE COURT: Two and a half weeks. I just want to know. Two and a half weeks is what you're asking.

What's the other side's position?

MR. GERBER: Excuse me, one more point of discovery, that is a deposition of the principal of the defendant, assuming he's not -- I don't think we need anybody else.

MR. REGIER: Good morning, Your Honor. Wade Regier appearing on behalf of the defendant the R.V. Doctor.

Our principal objection to the discovery is it doesn't comply with the statutory time periods before the --

requests for deposition before the 30-day period, request for production before the 45-day period. Object to those grounds previously indicated to counsel.

In the event the Court does decide that discovery is proper, we would require discovery of the reciprocal nature, what they're entitled to discover for the show cause we should be entitled.

THE COURT: What do you want that they have?

MR. REGIER: Deposition and substantial documents they asked -- that's where the problem lay. The plaintiff has indicated they cannot produce discovery within this hurry-up process, that they need extra time to do discovery. Their witnesses are unavailable, they can't get the documents together, yet they expect us to do it. Ordinarily this might not be a problem.

This came in December 16th, no notice to us, no prior notice we're in default. They grabbed all our keys, ran out -- shoved them in the car, then they filed a restraining order the next day.

Part of the problem, what happened, we had a manager who stole a lot of our documents and may have been defrauding the corporation that led up to the problem. May even be that was the anonymous tip that told them they're out of trust to create the whole thing.

We don't have a lot of the documents. We can come up with some of them.

We do have a extensive list of documents. We have several different finance companies on the lot. And we have -- I don't know, maybe over a million dollars in inventory. They want documentation for all those different

units, all the trade-ins, all the information concerning all that stuff. So that's one of the problems.

So we simply request a reciprocal discovery.

On the keys and stuff that like, I think that would be outside the restraining order. They took that before they procured the restraining order.

And that's our main objection, is time. But if the Court would see fit to do discovery, we simply request it.

THE COURT: When do you think you can get those documents?

MR. REGIER: Probably most of them -- he indicated I wanted to take a deposition on Friday morning, try to have all documents available Friday morning.

We simply request they have similar documents. They can't produce their

witnesses Friday morning. They say they don't have them available.

Now, as far as the continuance, ordinarily in a replevin action you're entitled to a three to ten day -- short time after the taking. That's one of the constitutional requirements, they take property and seize property and now they're asking for -- already had a 30-day period and got special permission from the Court to set up beyond the statutory period. Now they're asking for an extra two and a half weeks.

Essentially they shut us out of business. We cannot sell their units or any other units on the lot. That's the problem. We've never ever disputed their right to get their units. Mr. Gerber has a letter, what are you going to do with

the units? We never objected to you taking them.

He wants a key to repair one of the units. A pass key is available. He doesn't need a lot of information to open the door to fix on of the units. One of those units fine, the dispute is on the other units and taking of the keys without the restraining order.

And he is requesting full blown discovery, he's intimated some of the areas that he wished to question my client about, it has nothing to do with this limiting action for replevin for the units. Business relationships, whether all the deals went through, general financial condition of the firm and stuff.

They're asking for a substantial amount of information, and we feel that that would be prejudicial but it would -- type

of discovery so we don't have to have a restraining order without undue disadvantage.

THE COURT: What's your time frame, then? They want discovery, they're entitled to it, but what's your time limit?

MR. REGIER: We're ready on the 19th and we would request the Court do it on the 19th.

MR. GERBER: I misspoke myself first. I would request that the hearing be not earlier than the week of February 8th and preferably not on the Monday or Tuesday. I'll be out of town the latter part of the week before and I have a trial before that.

In terms of their discovery requested, they want to take my deposition the same time they're purporting to produce

documents. I'd love to see the documents. As long as they produce what they have, what's in their control, that's all I'm entitled to have.

I have no problem producing for them the documents they requested to the extent that they're available here locally. The difficulty is that the main files for my client are back in Charlotte, North Carolina. And while we do have Federal Express, what they've asked for is every billing we sent to this dealer since the beginning of the relationship. I've got scope issues, also privilege issues and so on.

In terms of the categories they are asking and the things that are not subject to work product or attorney/client privilege, something like that, if it's

available here, I believe that I can have it even tomorrow or Monday.

The other witness they want to depose, Your Honor, Julie England is - I forget the name of the town - up in northern Idaho someplace in a snow storm. I was able to speak with her yesterday and she was going to try to get out of there to Portland today. She was going to call me if she had succeeded getting out of town. As of when I left my office about 2:30, I had not heard from her today. So, we had agreed that I was to assume that she was not going to be back here by this evening or first thing tomorrow morning.

I think we are in a situation -- and I have no problem giving them any reasonable discovery. I haven't had a chance to see it, there may be technical objections. Generally speaking I scanned the things,

and what we've got, if it's not privileged and readily available, will make it available as soon as we can get it.

The other stuff may take some time. I don't think they're going to need that for the hearing. That's sort of their choice, not mine. I don't see at this stage how we're going to get all this done.

THE COURT: How long a hearing is this going to take?

MR. GERBER: If today so far is any indicator, I think a day just on the show cause hearing. I had it set for two hours.

THE COURT: Well, it's kind of difficult for them to do anything if you've got them shut down and decide to postpone this for six weeks of three weeks or whatever.

How would your company operate if they're shut down --

MR. GERBER: I would have been in for a Court order, we haven't seized anything. There is a restraining order against any sales or transfer --

THE COURT: That shuts them down.

MR. GERBER: -- without Court order. And I've given them the parameters under which we would be prepared to operate. And the letter that he made reference to I've seen today. If the issue truly is, as counsel indicated, what happens to the inventory units that we did not finance, if the issue is not whether there's a default, if the issue is whether there was sales out of trust, but if the issue is what are we going to do on an interim basis about the units that GECC did not

finance, I think we've got a one-hour hearing.

And, you know, if -- and I'm not trying to pin counsel to the wall for giving up a position or whatever, but if this description of what the issue is in this case is going -- to go into this hearing is accurate, we'll have a short hearing.

If the issue is the whole MaryAnn, it will be a long one in the nature of a trial, whether it be on the 19th schedule for two hours or some later date.

THE COURT: Well, the Court will order that you both give reciprocal discovery on this waiving the 30 days. And that you do that -- what you can tomorrow for both parties and the plaintiff to provide you tomorrow or the next day with what he has. He can document what he's got to get out

of the east coast there -- the south there, Charlotte, or whatever it is.

And then you can take the depositions of Mr. Thomas and then the deposition of counsel and whoever. And if she's stuck in a snow storm, there's nothing that can be done, but make her available when she gets here.

I will grant a continuance from the 19th just because I think we'd have to set it over now. We've got a murder case going, whole bunch of problems. A new judge getting sworn in on the 19th here in the morning, it's going to end up sliding everything else back a little bit. And I know we cannot hear it on the 19th, so I will grant a continuance. Grant it for one week until 1:30 on the 26th if it's a two-hour, three-hour hearing at the most.

If it can't be, you'll have to schedule it with the docket clerk.

MR. GERBER: I'm in trial that day in this county.

THE COURT: Set in when you can. We also have problems with settings. If you set something that's an emergency, it creates a real problem. And we've got these murder cases, they take precedence and you end up -- got another one getting ready to start and we're short a judge, but we're getting that fixed now a little bit.

You'll have to talk to the docket clerk, give them a realistic estimate.

MR. REGIER: In that event, they've posted a $10,000.00 bond, shut us down for 30 days, if able they'll shut us down for additional time. We request they put up a higher bond. They've indicated they have

approximately $400,000.00 worth of inventory, and the damages that were accrued to the plaintiff that the wrongful order of wrongfully issued will be substantially more than $10,000.00.

MR. GERBER: Just quickly, GECC, I think as a matter of judicial notice, GECC is good for it.

THE COURT: They've got enough bucks, they hurt you and you can prove it, you'll get it without a bond.

MR. REGIER: Thank you, Your Honor.

MR. GERBER: Thank you.

THE COURT: You can take this file down to the docket clerk and try to take that time if you can. May be able to accommodate you but I wouldn't bet on it.

(Proceeding adjourned.)

STATE OF OREGON)
) ss.
COUNTY OF CLACKAMAS)

I, Bobbi Baumann, do hereby certify that the time and place heretofore mentioned in the caption of the foregoing matter, I was an Official Court Reporter to the Circuit Court of the State of Oregon for the County of Clackamas; that at said time and place I reported in stenograph the proceedings had in the foregoing matter; that thereafter my notes were reduced to typewriting under my direction, and the foregoing transcript, consisting of Pages 1 to 21, inclusive, is a true and correct transcript of the proceedings, to the best of my ability and belief.

Dated this 7th day of March, 1989.

_____

Bobbi Baumann

IN THE CIRCUIT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

GENERAL ELECTRIC CREDIT CORPORATION, a foreign corporation,	)	No. 87-12-213
Plaintiff,	)	
v.	)	ORDER FOLLOWING PROVISIONAL PROCESS HEARING
R.V. DOCTOR, INC., an Oregon corporation, and GEORGE E. THOMAS and LINDA R. THOMAS, dba R.V. DOCTOR,	)	
Defendants.	)	

THIS MATTER came regularly before the undersigned judge of the above-entitled court for hearing at 1:30 p.m. on February 23, 1988, upon temporary restraining order and order to show cause herein dated December 17, 1987. Plaintiff appeared by and through Mr. Thomas A. Gerber, of its attorneys. Defendants appeared by and through Mr. Wade V. Regier, of their attorneys. An agreement was reached

between plaintiff and defendants following discussions in chambers, elements of which were placed on the record, and based upon the agreement reached and the court being otherwise fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED AS FOLLOWS:

1. The retrieval by their owners of the recreational vehicle units listed as numbers 25, 27, 28, 30 and 31 on page 2 and 3 of Exhibit 3 to plaintiff's complaint herein shall not be deemed a violation of any restraint herein, but plaintiff shall not be deemed to have waived any claim of security interest in units number 27 and 28. The retrieval by or on behalf of Deere Credit Services, INc. of the unit number 10 on page 2 of such exhibit to plaintiff's complaint

shall likewise not be deemed a violation of any restraint herein.

2. The repossession by Chrysler First Diversified Credit and Borg-Warner Acceptance Corporation of the units listed as numbers 1 - 9 and 11 - 17 on page 2 of such exhibit to plaintiff's complaint shall not be deemed to have been in violation of any restraint herein.

3. The following recreational vehicle units are released from the effect of any restraint herein for purposes of resale by or on behalf of defendants, or repossession by or on behalf of ITT Commercial Finance Corp.:

a. 1987 Pinnacle motor home, serial number P1814;

b. 1987 Pinnacle motor home, serial number 26474-P;

c. 1987 Aristocrat motor home, serial number A1816.

4. Plaintiff may, but shall not be obligated to, repossess the recreational vehicle units listed on Exhibit 1 attached hereto and numbered 6 - 31, and dispose of the same as a secured party at any time during and notwithstanding the continued pendency of this litigation, and may apply the proceeds thereof against the obligations secured.

5. The provisions of the Temporary Restraining Order and Order to Show Cause herein shall continue in Exhibit 1 attached hereto and incorporated herein by reference as if fully set forth, until such time as the same have been repossessed by or on behalf of plaintiff or until further order of this court.

6. The defendants, and those persons in active concert or participation with any of them who receive actual notice of this order by personal service or otherwise, are hereby restrained from and against any and all efforts to conceal, remove, destroy, alter, deface or dispose of any and all business records, documents, books, bank account documents or other records of the defendants pertaining to or arising out of the conduct of the business known as R.V. Doctor during the pendency of this litigation, or until further order.

7. Nothing contained herein or in the agreements to which this order pertain shall be deemed to be a waiver of defendants' claims for conversion arising out of the events occurring on December 16, 1987, claims that the temporary

restraining order and order to show cause wrongfully restrained the defendants, or any claims based upon allegations of commercially unreasonable sale or other disposition of collateral.

It is so ordered this _____ day of _____, 1988,

_____
Raymond R. Bagley, Jr.
Circuit Court Judge

Submitted by:
Thomas A. Gerber, OSB #74113
Attorney for Plaintiff
Trial Attorney

Approved as to form and content:

_____
Wade V. Regier
Attorney for Defendants

_____
Tom Gerber
Attorney for Plaintiff

IN THE CIRCUIT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

GENERAL ELECTRIC CREDIT CORPORATION, a foreign corporation,	)	No. 87-12-213
Plaintiff,	)	
v.	)	STIPULATION
R.V. DOCTOR, INC., an Oregon corporation, and GEORGE E. THOMAS and LINDA R. THOMAS, dba R.V. DOCTOR,	)	
Defendants.	)	

Plaintiff and the defendants, George E. Thomas et al., represented by Gary M. Bullock, P.C., hereby stipulate as follows:

1. Payment by said defendants to General Electric Capital Corporation ("GECC") of the sum of $18,910.00 represents the amount due from said defendants to plaintiff for principal and interest owed on November 9, 1988,

excluding expenses, attorneys' fees and costs claimed by plaintiff;

2. Such payment and acceptance thereof by plaintiff does not preclude either plaintiff or said defendants from adducing evidence as to the correctness of that sum or any other sums owing from one party to the other prior to or since November 9, 1988;

3. Such payment and the acceptance thereof shall not prejudice any other claims by either party against the other or against any third party, including, but not limited to, defendants' assertion of any claim that plaintiff failed to resell any units in a commercially reasonable manner.

It is so stipulated this 19th day of December, 1988.

Stoel, Rives, Boley, Jones & Grey

_____

Ernest Bonyhadi, OSB #52007
Of Attorneys for Plaintiff

_____

Wade V. Regier, OSB #86266
Of Attorneys for Defendants, Thomas et al.

UNITS FINANCED BY GECC

Out of Trust

1. 1986 Travelmaster motor home, unit no. 0807, Serial No. 4045.

2. 1987 Four Seasons mini-motor home, Serial No. 1814.

3. 1988 King of the Road travel trailer, Serial No. 2670.

4. 1987 Komfort Majorca travel trailer, Serial No. 9246.

5. 1987 Komfort Majorca travel trailer, Serial No. 9277.

Not Out-of-Trust

6. 1987 Four Seasons mini-motor home, Serial No. 0198.

7. Nomad travel trailer, Serial No. 0490.

8. Nomad travel trailer, Serial No. 0496.

9. Nomad fifth-wheel travel trailer, Serial No. 0497.

10. Nomad travel trailer, Serial No. 0508.

11. Nomad fifth-wheel travel trailer, Serial No. 0563.

12. 1987 Four Seasons camper, Serial No. 1003.

13. 1987 Komfort Majorca fifth-wheel travel trailer, Serial No. 9198.

14. 1987 Komfort Majorca travel trailer, Serial No. 9205.

15. 1987 Komfort Majorca fifth-wheel travel trailer, Serial No. 9251.

16. 1987 Komfort Majorca travel trailer, Serial No. 9279.

17. 1988 Komfort Majorca travel trailer, Serial No. 9339.

18. 1987 Komfort Majorca travel trailer, Serial No. 9344.

19. 1988 Komfort Majorca fifth-wheel travel trailer, Serial No. 9411.

20. 1988 Komfort Majorca fifth-wheel travel trailer, Serial No. 9429.

21. 1987 Aerolite mini-motor home, Serial No. 9989.

UNITS NOT FINANCED BY GECC

22. Lindy motor home, Serial No. 8680-310W.

23. Lindy motor home, Serial No. 8680-304W.

24. Lindy motor home, Serial No. 8680-277W.

25. Lindy motor home, Serial No. 8680-0119X.

26. Lindy motor home, Serial No. 8680-0102X.

27. Lindy motor home, Serial No. 8680-0103X.

28. 1979 Prowler travel trailer, Serial No. 20H23488S0293.

29. Used Midas motor home, Serial No. 2GBJG31M9D41543366.

30. 1983 Itasca motor home, Washington license no. LXA 107.

31. 1984 Prowler travel trailer, Serial No. S40774.

IN THE CIRCUIT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

GENERAL ELECTRIC CREDIT CORPORATION, a foreign corporation,	)	No. 87-12-213
Plaintiff,	)	
v.	)	
R.V. DOCTOR, INC., an Oregon corporation, and GEORGE E. THOMAS and LINDA R. THOMAS, dba R.V. DOCTOR,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

10:00 a.m., Monday
May 15, 1989
Clackamas County Courthouse
Oregon City, Oregon

BEFORE: THE HONORABLE SID BROCKLEY,
Circuit Court Judge

APPEARANCES:

Mr. E. Joseph Dean, Attorney at Law, appearing in behalf of the Plaintiff;

Mr. Wade V. Regier, Attorney at Law, appearing in behalf of Defendants.

* * * *

THE COURT: The third argument, go ahead.

MR. REGIER: The third argument goes to the fact that ordinarily under the Oregon statute, 83(g) number (1) you're entitled to a hearing within three to seven days on a replevin. You can't, under the terms of the statute -- you can at the plaintiff's request, the Court can set the restraining order hearing at a later date. It's our position that as a matter of law the restraining order in this case was not held within a constitutionally authorized time period under due process clause. Debtors are entitled to a pre-deprivation or a post-deprivation hearing. In this case the post-deprivation hearing was

approximately 66 days after the ex parte restraining order was obtained.

This issue concerning whether or not the restraining order was proper was reserved by the parties at the 66-day restraining order. That's part of the stipulated agreement and part of the order. I've got an extra copy if the Court would like it.

Paragraph seven of the order following provisional process hearing states, "Nothing contained herein or in the agreements to which this order pertains shall be deemed to be a waiver of the defendant's claim for conversion arising out of the events occurring on December 16th, 1987 claims that the temporary restraining order and order to show cause wrongfully restrained the defendants or any claims based upon allegations of

commercially unreasonable sale or other disposition of collateral."

I have an extra copy of that if the Court would like. The issue concerning whether or not 66 days was in and of itself overbroad, it was reserved. I'm not sure if the Court has ruled on that specific issue at this time. I want to make sure it was addressed and Court was on notice of that issue.

THE COURT: The Court believes, as previously rule, adversely to your clients, Mr. Regier, but your objection is preserved for appeal.

MR. REGIER: All right.

STATE OF OREGON)
) ss.
COUNTY OF CLACKAMAS)

I, CARLEEN Y. MCDONALD, hereby certify that I am an Official Court Reporter of the Circuit Court of the State of Oregon for Clackamas County; that I reported in Stenotype the hearing as set forth in the above-entitled matter; that thereafter I caused my said shorthand notes to be transcribed into the foregoing transcript and the foregoing 29 pages constitute a full, true and accurate transcript of the proceedings had as noted herein.

Dated at Oregon City, Oregon this 25th day of January, 1990.

[Carleen Y. McDonald]
CARLEEN Y. MCDONALD
Official Court Reporter

IN THE CIRCUIT OF THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

GENERAL ELECTRIC CREDIT CORPORATION, a foreign corporation,	)	No. 87-12-213
Plaintiff,	)	
v.	)	July 6, 1989
R.V. DOCTOR, INC., an Oregon corporation, and GEORGE E. THOMAS and LINDA R. THOMAS, dba R.V. DOCTOR,	)	
Defendants.	)	

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

Mr. E. Joseph Dean and
Mr. Joel A. Mullin,
Attorneys at Law, appearing on behalf of the Plaintiff.

Mr. Wade V. Regier, Attorney at Law, appearing on behalf of the Defendants.

THE COURT: We'll leave four in. Anything else, Mr. Regier?

MR. REGIER: Not -- I think the majority of the rest of it you probably already ruled on. There was some concern that I had on the findings of fact and the conclusions of law. One I already mentioned, I don't think the conclusions of law or judgment reflects that the temporary restraining order decision was expressly held lawful. I could be wrong, but I don't think there was any conclusion of law on that.

Although the Court did rule on it, it may be something technically that should be incorporated in the findings of fact and conclusions of law. I think what we raised was a due process and equal protection argument.

THE COURT: I denied your claim with respect to that, I think I did that orally. Is that incorporated in anything?

MR. REGIER: It isn't. I thought you might prefer, from a technical standpoint that might be something appropriate.

THE COURT: Actually when I rule against you on the counterclaims, doesn't that solve that?

MR. REGIER: I think that's different. This was something at the TRO hearing we had 66 days after the judgment. We reserved that issue for trial. I think that is more something the plaintiff's burden can prove at the TRO hearing. To that extent it may be different than a counterclaim.

THE COURT: Well, Mr. Dean, why don't you put in your words denying that. What is -- that is the question?

MR. DEAN: I don't know what claim it is, other than the three counterclaims this thing should reflect. Mr. Regier is the one you were sensitive about the appellate status of this judgment. I suggest whatever language he wants me to put in there --

THE COURT: I'll adjourn and let you folks do that.

MR. REGIER: The Court finds that the parties reserve the issue concerning the lawfulness of the temporary restraining order for the trial court to rule on at trial. The court trial costs --

THE COURT: Why don't you just write that down and give it to Mr. Dean?

MR. DEAN: The difficulty I have, we have the language in here that the counterclaims have been ruled on. What is this claim? If it isn't a counterclaim,

if it isn't something pleaded, I don't know what he's talking about that's been ruled on. What claim is it? A private party violated the Constitution? That wasn't pleaded. I don't want to get stonewalled here.

THE COURT: He is claiming that the provisional process was unlawfully obtained, and I think some of those counterclaims you can probably find somewhere in there where he claims it.

MR. REGIER: I think part of the confusion is there's a claim that they used the restraining order in a vindictive and illegal manner. That is one counterclaim. My understanding, perhaps I'm wrong, when you go to a temporary restraining order hearing, a lot of times the defendant has a -- all he has to defend at that point that the restraining

order is legal. Show it's illegal at the hearing, he gets to collect upon the bond.

I'm sure the claim for conversion and some of the other things certainly encompass the fact that the restraining order could have been illegal, but I think that's a separate, distinct question and it's really a matter for the plaintiff to prove that the temporary restraining order, that the restraining order was lawful, and we could have established that at the restraining order hearing without filing a counterclaim.

In fact, ordinarily it's assumed you don't have a counterclaim filed restraining order hearing, generally you have a hearing within ten days. So if they're unable to say prove that the restraining order was lawful, we collect upon the bond.

THE COURT: Plaintiff's claims for unlawful obtaining for -- of a restraining order are denied. Just stick that in there, just above part --

MR. DEAN: R.V. Doctor's claims.

THE COURT: -- R.V. Doctor's claims.

MR. DEAN: Can we get that down?

MR. REGIER: As far as the findings of fact, I don't want to argue all the findings of fact. I just want to make sure I didn't inadvertently waive or accidentally -- I understand that the Court ruled as a matter of law that the R.V. Doctor failed to establish a breach of peace. By ruling that way, the Court can find -- I don't feel this conduct sufficiently rises to a sufficient standard to recreate a breach of peace. But it's not clear to me what facts the

Court relied upon to find that this did not constitute a breach of peace.

THE COURT: I'd have to look at the record.

STATE OF OREGON)
) ss.
COUNTY OF CLACKAMAS)

I, Carleen McDonald, hereby certify that I am an Official Court Reporter to the Circuit Court of the State of Oregon for Clackamas County, that I reported in Stenotype the foregoing proceedings and subsequently transcribed my said shorthand notes into the typewritten transcript, pages 1 through 25, both inclusive; that the said transcript constitutes a full, true and accurate record of the proceedings, as requested, to the best of my knowledge, ability and belief.

Dated this [16th] day of [February], 1990 at Portland, Oregon.

[Carleen McDonald]
Carleen McDonald
Official Court Reporter

IN THE CIRCUIT COURT IN THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

GENERAL ELECTRIC CAPITAL CORPORATION, a foreign corporation, Plaintiff, v. RV DOCTOR, INC., an Oregon corporation, GEORGE E. THOMAS and LINDA R. THOMAS doing business as RV DOCTOR; CHRYSLERFIRST WHOLESALE CREDIT, INC., a foreign corporation; CHRYSLER FIRST DIVERSIFIED CREDIT, INC., a foreign corporation; COACHMAN INDUSTRIES, INC., a foreign corporation; ITT COMMERCIAL FINANCE CORP., a foreign corporation, and TRANSAMERICA COMMERCIAL FINANCE CORPORATION, a foreign corporation formerly known as Borg-Warner Acceptance Corporation, Defendants.	No. 8712213 FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled action came on regularly for trial on April 4, 1989 before the above-entitled court.

Plaintiff appeared by E. Joseph Dean and Joel A. Mullin, of its attorneys; defendant George E. Thomas appeared in person and by his attorney Wade V. Regier; defendants Linda Thomas and RV Doctor, Inc. appeared by Wade V. Regier, of their attorneys; and the remaining defendants did not appear. Testimony and exhibits on behalf of the parties appearing at the trial were received in evidence, and the court heard and considered the testimony, examined and considered the exhibits, and received and considered arguments by the parties. Now being fully advised, the court hereby makes the following findings of fact and conclusions of law pursuant to ORCP 62 and UTCR 6.110:

FINDINGS OF FACT

1. On September 15, 1986 George E. Thomas, dba RV Doctor, knowingly and

voluntarily entered into the Inventory Financing Agreement ("IFA") with plaintiff General Electric Capital Corporation ("GECC"). At about the same time George Thomas knowingly and voluntarily entered into the addendum--Inventory Financing Agreement ("Addendum") and executed a UCC financing statement in favor of GECC as well as the Personal Guaranty. The personal Guaranty was also executed by George Thomas' wife, Linda Thomas. The jury trial waivers in the IFA and the Personal Guaranty are conspicuous and enforceable. Likewise, the choice of law provision in the IFA and the Addendum is conspicuous and enforceable. The court's determination is not affected in this case by whether Connecticut or Oregon law is utilized, as the same result would obtain.

2. Pursuant to the terms of the IFA and Addendum and in reliance upon the UCC financing statement and Personal Guaranty, GECC provided financing to Mr. Thomas for the purchase of new recreational vehicles for resale to the public. The IFA provided that upon the sale by Mr. Thomas of a GECC-financed recreational vehicle, he was to repay GECC the amount financed or hold the proceeds of a sale in trust for repayment to GECC. Failure to abide by this term is known in the trade as a sale "out of trust" and constituted a default under the IFA and gave GECC the right to immediate possession of inventory in which it held a security interest.

3. GECC performed periodic inspections of Mr. Thomas' inventory of GECC-financed units to aid in monitoring his compliance with the repayment

obligations of the IFA. To avoid those obligations, commencing in February 1987, Mr. Thomas' authorized employees made repeated misrepresentations to GECC's inspectors for the purpose of causing them to believe that units sold and paid for were in fact unsold. For example, employees falsely told the inspector that a unit sold and delivered on July 22, 1987, was at the Umatilla County Fair on August 14 and August 20, 1987, was in inventory on September 18, 1987 and was at the manufacturer's plant for repair on October 23, 1987. GECC in reliance upon these misrepresentations, did not declare Mr. Thomas to be in default of the requirements of the IFA. Defendants George Thomas, Linda Thomas and RV Doctor, Inc. (hereafter "the RV Doctor defendants") are estopped from relying

upon GECC's acceptance of late payments induced by the foregoing misrepresentations as a basis for finding that GECC waived, modified or should be estopped from relying upon the IFA repayment provisions.

4. On or about December 15, 1987, GECC received a tip from a former RV Doctor employee that GECC-financed units were missing from the RV Doctor lot and were unpaid for. The former RV Doctor employee stated that he was told to tell the GECC inspector that sold GECC-financed units were fairs or at the factory for repair. Acting on the tip, Julie Englund, an employee of GECC, went to the RV Doctor lot on December 16, 1987 to conduct an inventory inspection.

5. Ms. Englund discovered six GECC-financed units to be missing without

explanation. The RV Doctor defendants have admitted that each of those units had been sold and that contrary to the requirements of the IFA, Mr. Thomas had neither paid GECC upon their sale nor held the proceeds of those sales in trust for GECC.

6. On discovery of the out-of-trust situation, Ms. Englund indicated she wanted to meet with George Thomas. Despite assurances of Mr. Thomas' imminent return, he did not appear. Ms. Englund then requested, and was given by the RV Doctor employee left in charge, pass keys so that she could enter units and place stickers on them stating that GECC was a "Secured Party." Later the employee voluntarily gave Ms. Englund sets of keys to RV Doctor's new inventory. Ms. Englund was not given and did not take keys to

units placed upon RV Doctor's lot for storage, repair or consignment sale.

7. At no time did Ms. Englund or any other GECC representative or attorney use any threats, force or artifice in connection with the actions taken to secure GECC's collateral. Before any request was made to Ms. Englund to leave the premises, Mr. Thomas' son called the Clackamas County Sheriff's Department to have her removed. The deputy sheriff who came to the scene did not assist GECC in any fashion in its attempt to secure its collateral. Each action taken by GECC in effectuating the repossession of its collateral was in full compliance with its rights and obligations under the IFA and Addendum.

8. On December 17, 1987, GECC's attorney, Tom Gerber, notified Mr. Thomas'

counsel, Gary Bullock, that GECC would seek that afternoon a temporary restraining order preventing the disposition without court approval of units in which it held a security interest. The parties discussed whether or not a judge would be available. Mr. Gerber told Mr. Bullock that he would appear and seek to find a judge to rule on whether or not a temporary restraining order should be issued. Mr. Bullock was unable to appear at Clackamas County Circuit Court that afternoon.

9. Mr. Gerber and Mr. Bullock agreed to meet on the morning of December 18, 1987 at the Clackamas County Courthouse for the purpose of discussing modification of the temporary restraining order to facilitate Mr. Thomas' continued sale of new recreational vehicles. The parties'

lawyers met at the courthouse. The parties, through their attorneys, were unable to agree upon a stipulated modification. The actions of GECC in obtaining provisional process were lawful, were undertaken with probably cause, were undertaken in good faith and were not undertaken to secure an improper advantage.

10. GECC had a security interest in six units that RV Doctor had purchased with financing Chrysler First Wholesale Credit, Inc. ("CFWC") provided for RV Doctor (hereafter refereed to as "the six Lindy units").

11. As noted above, GECC obtained a TRO restraining RV Doctor from disposing of RV units, including the six Lindy units. The TRO was served on RV Doctor

released the six Lindy units. The TRO was served on RV Doctor on December 17, 1987.

12. On December 18, 1987, RV Doctor released the six Lindy units to CFWC to satisfy a debt owed CFWC of $150,847.00. CFWC's security interest was inferior to that of GECC.

13. Pursuant to a repurchase agreement with Skyline, CFWC sold the six Lindy units to Skyline for $148,932.40 converting the units to cash.

14. GECC objected to the repurchase, insisting that the collateral itself remain subject to the security interest.

15. The reasonable market value of the collateral was substantially less than $148,932.40.

16. In response to GECC's demand, Skyline and CFWC rescinded the transaction, allowing GECC to assert its

security interest against the collateral itself.

17. GECC untimely liquidated the six Lindy units for $115,875.00. The court approved the sale but the six Lindy units reserved its right to object to the sale at trial.

18. There is no evidence that the liquidation price was below market value or that any liquidation was commercially unreasonably.

19. GECC's accounting shows overpayment of $5,939.91 with respect to actual funds received.

20. Paragraph 14 of the IFA states, in part: "Dealer agrees to pay court costs and reasonably attorney's fees incurred by GECC in enforcing GECC's rights and remedies after default under this agreement."

CONCLUSIONS OF LAW

1. Since George E. Thomas dba RV Doctor was in default under IFA, plaintiff is entitled to relief pursuant to its prayer for foreclosure.

2. The RV Doctor defendants do not have a claim that has been established by the evidence for conversion or trespass.

3. With respect to the defenses which have been interposed by the RV Doctor defendants to the contract claim, the court rules as follows:

4. On the first of their affirmative defenses (breach of contract and/or unclean hands) the court has tried that affirmative defense and finds it is without merit and rules against the RV Doctor defendants on that claim.

5. On the second affirmative defense (modification or acceptance of late

payments), as previously indicated in the findings of fact, the court finds against the RV Doctor defendants on that claim.

6. On the third affirmative defense waiver and/or estoppel), the court has previously indicated in the findings of fact and reaffirms its findings that the RV Doctor defendants are not entitled to prevail upon that defense.

7. The court likewise finds with respect to the fourth affirmative defense (wrongful self-help repossession and/or unclean hands), that the RV Doctor defendants are not entitled to prevail on that defense.

8. The court finds against the RV Doctor defendants on the first counterclaim.

9. The court finds against the RV Doctor defendants on the second counterclaim.

10. The evidence presented does not, as a matter of law, constitute a claim for abuse of process. It establishes neither an ulterior purpose nor a willful act in the use of the process not proper in the regular conduct of the proceeding. Kelly v. McBarron, 258 or 149, 154 (1971); Larson v. Credit Bureau, 279 Or 405 (1977).

11. The jury trial waiver provision in the documents signed by the parties encompasses the claims of abuse of process made by the RV Doctor defendants. While all abuse of process claims would not be included, these claims relate directly to whether or not plaintiff properly exercised its rights under the contract.

The court finds, as trier of fact, that the evidence does not establish the RV Doctor defendants' abuse of process claim.

12. GECC's disposition of the collateral was commercially reasonable.

13. While a higher price would have been realized by GECC's acquiescence in Skyline's repurchase of the six Lindy units, the repurchase resulted only from the fortuitous combination of RV Doctor's violation of the restraining order, CFWC's misconception of the priority of its security interest, and the existence of the repurchase agreement with Skyline. In effect, RV Doctor seeks credit for $33,000.00 more than the units were worth. GECC is not required to indemnify the loss of this windfall. Amid demands, counterdemands, lawsuits, and threats of lawsuits, the appropriate course of action

for GECC was not clear. It was required only to act in a commercially reasonably manner. ORS 79.5070(2). It did so.

14. RV Doctor is entitled to judgment in the amount of $5,939.91 with respect to its claim for accounting, subject to determination of the entitlement of the respective parties to attorney fees pursuant to ORCP 68. Execution of that judgment is hereby stayed pending determination of claims for costs and attorney fees.

15. GECC is entitled to judgment on its three claims in the second amended complaint against defendants George E. Thomas, Linda R. Thomas, and RV Doctor, Inc., and each of them.

16. RV Doctor's claims for unlawful obtaining of a restraining order are denied.

DATED this _____ day of July, 1989.

_____
Sid Brockley, Circuit Judge

Submitted by:
E. Joseph Dean, OSB No. 74357
Of attorney for Plaintiff

IN THE CIRCUIT COURT IN THE STATE OF OREGON

FOR THE COUNTY OF CLACKAMAS

GENERAL ELECTRIC CAPITAL CORPORATION, a foreign corporation, Plaintiff, v. RV DOCTOR, INC., an Oregon corporation, GEORGE E. THOMAS and LINDA R. THOMAS doing business as RV DOCTOR; CHRYSLERFIRST WHOLESALE CREDIT, INC., a foreign corporation; CHRYSLER FIRST DIVERSIFIED CREDIT, INC., a foreign corporation; COACHMAN INDUSTRIES, INC., a foreign corporation; ITT COMMERCIAL FINANCE CORP., a foreign corporation, and TRANSAMERICA COMMERCIAL FINANCE CORPORATION, a foreign corporation formerly known as Borg-Warner Acceptance Corporation, Defendants.	No. 8712213 FORECLOSURE JUDGMENT

THE COURT FINDS that plaintiff General Electric Capital Corporation ("GECC") filed an action against all the named

defendants herein for judicial foreclosure; and

THE COURT FINDS that defendant Transamerica Commercial Finance Corporation ("Transamerica") filed a counterclaim against plaintiff and defendants Chrysler First Wholesale Credit, Inc., and Transamerica filed cross-claims against RV Doctor, Inc., George Thomas, and Linda Thomas; and

THE COURT FINDS that, pursuant to a stipulated order of dismissal, Transamerica dismissed its counterclaim against plaintiff and its cross-claims against defendant George Thomas, Linda Thomas, and RV Doctor, Inc., with prejudice and all of the claims asserted by Transamerica were dismissed with prejudice and without award of costs,

disbursements or attorney's fees in favor of or against Transamerica; and

THE COURT FINDS that, pursuant to a stipulated agreement, plaintiff's claim against Coachmen Industries, Inc. was dismissed without prejudice and without any award of costs, disbursements or attorney's fees in favor of or against Coachmen Industries, Inc.; and

THE COURT FURTHER FINDS that defendants George Thomas, Linda Thomas, and RV Doctor, Inc., prevailed on the cross-claims asserted by Chrysler First Wholesale Credit, Inc. and they are properly considered the prevailing parties on those cross-claims; and

THE COURT FURTHER FINDS that defendants ITT Commercial Finance Corp. and Chrysler First Diversified Credit, Inc. have failed

to answer or otherwise appear in this proceedings and are in default; and

THE COURT FURTHER FINDS that plaintiff has a purchase money security interest in the items of inventory numbered 1-22 and 30 on Exhibit 4 to plaintiff's amended complaint (a copy of Exhibit 4 is attached hereto), and any and all proceeds thereof; and

THE COURT FURTHER FINDS that plaintiff has a non-purchase money security interest in all other inventory of recreational vehicles belonging to defendants Thomas, or either of them including, but not necessarily limited to, the items of inventory numbered 23-28 on Exhibit 4 to plaintiff's amended complaint and the items of inventory numbered 51-59 on Attachment A to this judgment, and any and all proceeds thereof; and

THE COURT FURTHER FINDS that the security interests of plaintiff, as stated in the foregoing paragraphs, in all of such inventory and proceeds are superior to the title, rights and interest of all the defendants in this litigation; and

THE COURT FURTHER FINDS that the item of inventory numbered 29 on Exhibit 4 to plaintiff's amended complaint was disposed on by defendant Coachmen Industries, Inc. prior to the filing of plaintiff's amended complaint and is not subject to these proceedings; and

THE COURT FURTHER FINDS that, pursuant to orders of the court following hearings, thereon, all items of inventory listed on Exhibit 4 to plaintiff's amended complaint (except for item number 29) have been made available to plaintiff on an interim basis so as to minimize continuing interest

accruals, and that plaintiff's security interest remains attached to such proceeds; and

THE COURT FURTHER FINDS that defendants Thomas were obligated to plaintiff for the sum of $278,365.05, plus plaintiff's costs, disbursements and attorney fees as hereafter awarded by the court, all of which constitute the debt secured by plaintiff's security interest; and

THE COURT FURTHER FINDS that defendants Thomas are entitled to credits against the sums due to plaintiff for all payments made to plaintiff and all of the proceeds the plaintiff received from disposition of the inventory described above, as of the date on which such payments and proceeds were received; and

THE COURT FURTHER FINDS the RV Doctor is entitled to judgment in the amount of

$5,939.91 with respect to its claim for accounting, subject to determination of the entitlement of the respective parties to attorney fees pursuant to ORCP 68; and

THE COURT FURTHER FINDS the disposition of all of the inventory listed on the attached Exhibit 4 and credit to defendants Thomas on account of the proceeds of such disposition render unnecessary any sale of that collateral pursuant to this judgment.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. The lien of plaintiff's security interest being foreclosed herein constituted and constitutes a valid and subsisting lien against all of the property described above, and all proceeds thereof, superior to any interest, lien or claim of the defendants, or any of them,

in that property, and defendants, and each of them, are forever foreclosed of all right, title, interest or claim in or to such property, and all proceeds thereof, without right to redemption.

2. Judgment is hereby granted in favor of plaintiff and against defendants George E. Thomas, Linda R. Thomas, and R.V. Doctor, Inc., an Oregon corporation, on each and every one of the counterclaims asserted by any one or more of those three defendants against plaintiff, except that defendant RV Doctor is awarded judgment against plaintiff in the sum of $5,939.91 with respect to its claim for accounting, subject to determination of the entitlement of the respective parties to attorney fees pursuant to ORCP 68, and execution thereunder is hereby stayed pending determination of claims for costs

and attorney fees. RV Doctor's claims for unlawful obtaining of a restraining order are denied.

3. On the plaintiff's three claims in the second amended complaint against defendants George E. Thomas, Linda R. Thomas, and RV Doctor, Inc., and each of them, judgment is hereby granted to plaintiff and against defendants George E. Thomas, Linda R. Thomas, and RV Doctor, Inc., and each of them.

4. So long as plaintiff's judgment against George E. Thomas, Linda R. Thomas, and RV Doctor, Inc. remains unsatisfied, if and when it is determined that any of the RV Doctor defendants still owns any of the units listed as items 51 to 59 on Attachment A to this judgment, at the request of plaintiff the sheriff shall sell on execution such collateral and

apply the proceeds to the costs of sale, then to satisfaction of plaintiff's judgment, and the balance (if any) to the person lawfully entitled, provided, however, that other forms of execution or garnishment may issue hereunder at any time, whether or not a sheriff's sale under this paragraph has occurred or is pending.

5. Plaintiff GECC is entitled to a judgment against defendants ITT Commercial Finance Corporation and Chrysler First Diversified Credit, Inc. as those two parties have failed to file an answer or otherwise appear in this proceeding.

6. Defendants George Thomas, Linda Thomas and RV Doctor, Inc., are awarded judgment against defendant Chrysler First Wholesale Credit, Inc. on the cross-claims asserted by Chrysler First Wholesale

Credit. All other claims asserted by Chrysler First Wholesale Credit, Inc. are hereby dismissed with prejudice and without an award of costs or disbursements in favor of any party. The prevailing party in the litigation between Chrysler First Wholesale Credit, Inc. and defendants George Thomas, Linda Thomas and RV Doctor, Inc. shall be awarded reasonable attorneys' fees and costs.

7. All claims asserted by Transamerica, whether against plaintiff or any of the defendant, are hereby dismissed with prejudice, without an award of costs, disbursements or attorney's fees in favor of any party against Transamerica.

8. Plaintiff's claim against Coachmen Industries, Inc. is dismissed without prejudice and without any award of costs,

disbursements or attorney's fees in favor of or against Coachmen Industries, Inc.

9. It is the intention of the Court that this judgment refers to all claims of all parties herein. In the event the judgment has not done so, pursuant to ORCP 67B, the court directs entry of this judgment as a final judgment and expressly determines that there is no just reason for delay.

DATED this _____ day of July, 1989.

_____
Sid Brockley
Circuit Judge

Submitted by:

E. Joseph Dean, OSB No. 74357
Of Attorneys for Plaintiff

UNITS FINANCED BY GECC

Out of Trust

1. 1986 Travelmaster motor home, unit no. 0807, Serial No. 4045.

2. 1987 Four Seasons mini-motor home, Serial No. 1814.

3. 1988 King of the Road travel trailer, Serial No. 2667.

4. 1988 King of the Road travel trailer, Serial No. 2670.

5. 1987 Komfort Majorca travel trailer, Serial No. 9246.

6. 1987 Komfort Majorca travel trailer, Serial No. 9277.

Not Out-of-Trust

7. 1987 Four Seasons mini-motor home, Serial No. 0198.

8. Nomad travel trailer, Serial No. 0490.

9. Nomad travel trailer, Serial No. 0496.

10. Nomad fifth-wheel travel trailer, Serial No. 0497.

11. Nomad travel trailer, Serial No. 0508.

12. Nomad fifth-wheel travel trailer, Serial No. 0563.

13. 1987 Four Seasons camper, Serial No. 1003.

14. 1987 Komfort Majorca fifth-wheel travel trailer, Serial No. 9198.

15. 1987 Komfort Majorca travel trailer, Serial No. 9205.

16. 1987 Komfort Majorca fifth-wheel travel trailer, Serial No. 9251.

17. 1987 Komfort Majorca travel trailer, Serial No. 9279.

18. 1988 Komfort Majorca travel trailer, Serial No. 9339.

19. 1987 Komfort Majorca travel trailer, Serial No. 9344.

20. 1988 Komfort Majorca fifth-wheel travel trailer, Serial No. 9411.

21. 1988 Komfort Majorca fifth-wheel travel trailer, Serial No. 9429.

22. 1987 Aerolite mini-motor home, Serial No. 9989.

UNITS NOT FINANCED BY GECC

23. Lindy motor home, Serial No. 8680-310W.

24. Lindy motor home, Serial No. 8680-304W.

25. Lindy motor home, Serial No. 8680-277W.

26. Lindy motor home, Serial No. 8680-0119X.

27. Lindy motor home, Serial No. 8680-0102X.

28. Lindy motor home, Serial No. 8680-0103X.

29.Travelmaster motor home, Serial No. 1G3KP37W503316636.

30. 1979 Prowler travel trailer, Serial No. 20H23488S0293.

ATTACHMENT A

51.1987 17 foot Chinook, Serial No. 6846, Newport.

52.1976 17 foot Chinook, Serial No. 1706.

53.1977 17 foot Scat, License No. H954289.

54.1982 17 foot Komfort 5th wheel, Serial No. 4274.

55.1986 29 foot Pompano, Serial No. 2351.

56.1974 24 foot Goldensest, Serial No. 4068

57.1987 8 foot Four Seasons camper, Serial No. 1008.

58. 1987 7 foot Four Seasons pop-up, Serial No. 2929

59.1969 5 ball 17 foot trailer.

CERTIFICATE OF SERVICE

I certify that on July 6, 1989, I served the attached FORECLOSURE JUDGMENT by mail on:

Wade Regier
Gary M. Bullock, P.C.
Suite 1500, 1001 SW Fifth Avenue
Portland, OR 97204

Of Attorneys for Defendants George E. and Linda R. Thomas, dba RV Doctor and RV Doctor, Inc.

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Of Attorneys for Defendant Coachmen Industries, Inc.

Barry Adamson
775 Boise Cascade Building
1600 SW Fourth Avenue
Portland, OR 97204

Of Attorneys for Chrysler First Wholesale

DATED: July 6, 1989.

E. Joseph Dean, OSB No. 74357
Joel A. Mullin, OSB No. 86253
Of Attorneys for Plaintiff

Filed: January 23, 1991
IN THE COURT OF APPEALS
OF THE STATE OF OREGON

GENERAL ELECTRIC CREDIT CORPORATION, a foreign corporation, Respondent, v. R.V. DOCTOR, INC., an Oregon corporation, and GEORGE E. THOMAS and LINDA R. THOMAS, dba R.V. DOCTOR, Appellants, CHRYSLER FIRST WHOLESALE CREDIT, INC., a foreign corporation; COACHMAN INDUSTRIES, INC., a foreign corporation; TRANSAMERICA COMMERCIAL FINANCE CORPORATION, a foreign corporation formerly known as Borg-Warner Acceptance Corp. CHRYSLER FIRST DIVERSIFIED CREDIT, INC., a foreign corporation and ITT COMMERCIAL FINANCE CORP., a foreign corporation, Defendants.	No. 87-12-213 CA A61563 APPELLATE JUDGMENT

Date argued or submitted on briefs:
January 4, 1991

Before: Buttler, Presiding Judge, and
Rossman and De Muniz, Judges

Attorney for Appellants:
Wade V. Regier

Attorney for Respondent:
E. Joseph Dean

AFFIRMED WITHOUT OPINION

IN THE SUPREME COURT

OF THE STATE OF OREGON

GENERAL ELECTRIC CAPITAL CORP, Respondent,	)	
v.	)	CA A61563 SC S37887
R.V. DOCTOR, INC. Appellant/Petitioner	)	
THOMAS GEORGE E. Appellant/Petitioner	)	ORDER DENYING REVIEW
THOMAS LINDA R. Appellant/Petitioner	)	
CHRYSLER FIRST WHOLESALE CREDIT Defendant	)	
COACHMAN INDUSTRIES, INC. Defendant	)	
TRANSAMERICA COMMERCIAL FINANCE Defendant	)	
CHRYSLER FIRST DIVERSIFIED CREDIT Defendant	)	
ITT COMMERCIAL FINANCE CORP Defendant	)	

The Court has considered the petition for review and orders that it be denied.

Date: April 30, 1991.

_____
Edwin J. Peterson
Chief Justice

Graber, J not participating

Copies to:
Dean E. Joseph
Attorney for Respondent

Regier Wade
Attorney for Appellant/Petitioner

Supreme Court, U.S.
FILED
OCT 28 1991
OFFICE OF THE CLERK

(2)

No. 91-176

In the Supreme Court of the United States

OCTOBER TERM, 1991

R.V. DOCTOR, INC., an Oregon Corporation; GEORGE E. THOMAS AND LINDA R. THOMAS, dba R.V. DOCTOR, PETITIONERS,

v.

GENERAL ELECTRIC CAPITAL CORPORATION, RESPONDENT.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

BRIEF FOR THE RESPONDENT IN OPPOSITION

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18

QUESTION PRESENTED

After concluding that petitioners had violated the terms of a financing agreement between the parties, GECC obtained an *ex parte* TRO restraining petitioners from selling or otherwise disposing of inventory in which GECC had a security interest. The post TRO show-cause hearing initially was scheduled to take place roughly one month after issuance of the TRO. During that time petitioners declined GECC's offer to negotiate a change in the TRO that would enable them to continue to sell inventory, failed to request an expedited hearing, and refused to engage in expedited discovery. Because discovery was not complete at the time of the scheduled hearing, the hearing was rescheduled for a month later. At that time petitioners stipulated to an indefinite continuation of the TRO. The question presented is:

Whether, under these circumstances, a delay in holding a show-cause hearing until two months after the issuance of an *ex parte* TRO violates the Due Process Clause of the Fourteenth Amendment.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-176

R.V. DOCTOR, INC., an Oregon Corporation;
GEORGE E. THOMAS AND LINDA R. THOMAS,
dba R.V. DOCTOR, PETITIONERS,

v.

GENERAL ELECTRIC CAPITAL CORPORATION, RESPONDENT.

On Petition for a Writ of Certiorari to the Oregon Court of Appeals

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

JUDGMENTS BELOW

The trial court's Findings of Fact and Conclusions of Law (Pet. App. 90-107) and its Foreclosure Judgment (*id.* at 108-124) are unreported. The court of appeals' order affirming the trial court's judgment without opinion (*id.* at 125-126) is reported at 105 Or. App. 414, 804 P.2d 1231. The Oregon Supreme Court's order denying review (*id.* at 127-128) is reported at 311 Or. 349, 811 P.2d 144.

JURISDICTION

The Oregon Supreme Court's order denying review was entered on April 30, 1991. The petition for a writ of certiorari was filed on July 29, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257. For

reasons explained more fully below, petitioners' failure to raise in timely fashion the federal constitutional claim presented here deprives this Court of jurisdiction to review the judgment of the Oregon Court of Appeals in this case.

STATEMENT

A. The Parties

Respondent General Electric Capital Corporation ("GECC") is a corporation specializing in the making of commercial loans.[1] During the relevant time period, petitioner George Thomas, operating under the trade name R.V. Doctor, was in the business of purchasing new and used recreational vehicles and reselling them to consumers.[2] Thomas financed his acquisition of such vehicles by means of loans from GECC and other lenders.

B. The Contractual Relationship Between The Parties

On September 15, 1986, Thomas entered into an Inventory Financing Agreement ("IFA") with GECC. Contemporaneously, he executed an addendum to the IFA, a UCC financing statement, and a personal guaranty in favor of GECC. Pet. App. 91-92. Pursuant to the terms of the IFA and its addendum, GECC provided financing to Thomas for the purchase of new recreational vehicles to be resold to the public. *Id.* at 93.

The IFA and the financing statement together served to give GECC a security interest both in GECC-financed vehicles and in all other vehicles owned by Thomas. Un-

---

[1] GECC is a wholly owned subsidiary of General Electric Financial Services, Inc., which in turn is a wholly owned subsidiary of General Electric Company. GECC has no non-wholly owned subsidiaries in the United States that have publicly traded shares or debt securities.

[2] For simplicity's sake, and because George Thomas was the principal actor on behalf of petitioners, we will refer to all petitioners collectively as "Thomas."

der the terms of the IFA, each time Thomas sold a GECC-financed vehicle he was obliged to repay GECC the amount financed and to hold all proceeds of the sale in trust for GECC until such repayment was made. Failure to do so—known in the trade as a "sale out of trust"—constituted a default under the IFA and entitled GECC to immediate possession of all remaining inventory in which it held a security interest. Pet. App. 93. A sale out of trust is a serious matter for lenders because it reduces the collateral securing the loan.

C. Thomas's Breaches Of The IFA

In order to ensure that inventory financing borrowers comply with their obligation not to make sales out of trust, GECC reserves the right to conduct periodic inspection of the borrowers' inventory. In accordance with this contractual entitlement, GECC employees periodically inspected Thomas's inventory of GECC-financed recreational vehicles. Pet. App. 93-94. Notwithstanding this safeguard, Thomas repeatedly violated the prohibition against sales out of trust and actively attempted to conceal these violations from GECC. As the trial court expressly found, "commencing in February 1987, Mr. Thomas's authorized employees made repeated misrepresentations to GECC's inspectors for the purpose of causing them to believe that units sold and paid for were in fact unsold." *Id.* at 94.

In December 1987, GECC received a tip from a former R.V. Doctor employee that GECC-financed vehicles for which GECC had not been repaid were missing from the R.V. Doctor lot. The former employee further stated that when employed by Thomas he had been instructed to tell GECC inspectors that missing GECC-financed vehicles were at fairs or at the factory being repaired when in fact they had been sold out of trust. Pet. App. 95.

On December 16, 1987, GECC employee Julie Englund went to the R.V. Doctor lot to investigate the former employee's tip. Ms. Englund discovered that six GECC-

financed vehicles were missing from the lot. Respondents have subsequently admitted that each of those vehicles had been sold out of trust. Pet. App. 95-96. At the time Ms. Englund discovered the out-of-trust sales, petitioners owed GECC $121,356.74 in principal alone in connection with the financing of the six missing units. Tr. 208; P. Ex. 15.

D. GECC's Efforts To Protect Its Security Interest By Obtaining A Temporary Restraining Order

On December 17, 1987, GECC's attorney notified Thomas's counsel that later that day GECC would seek a temporary restraining order ("TRO") preventing Thomas from selling or otherwise disposing of any units in which GECC had a security interest without court approval. Thomas's counsel indicated that he would be unable to appear in court that afternoon. Pet. App. 97-98.[3] Pursuant to its rights under Oregon law, GECC filed a sworn petition for a TRO in state court on December 17. Finding "probabl[e] cause to believe that immediate and irreparable injury, damage or loss to [GECC] is imminent," the court granted a TRO on the condition that GECC post a bond in the amount of $10,000 to cover damages "incurred or suffered by any party who is found to have been wrongfully enjoined or restrained * * *." *Id.* at 29.

The TRO required Thomas to appear at a hearing to show cause why the property that was the subject of the order should not be permanently delivered to GECC. Pet. App. 32. Rule 83(G)(1) of the Oregon Rules of Civil Procedure provides that such hearings are to take place between three and seven days after service of the TRO unless the plaintiff requests that the hearing be held at a later date. Pursuant to that provision, GECC

[3] The record reflects that Thomas's counsel elected to attend an aerobics class instead of the hearing on the temporary restraining order. Tr. 625-626.

requested that the show-cause hearing be set more than seven days after service of the TRO. The court accordingly set the hearing for January 19, 1988. Pet. App. 32.

E. Subsequent Proceedings

Immediately after the issuance of the TRO on December 17, the parties agreed to meet the following morning to discuss ways of modifying the TRO to facilitate Thomas's continued sale of recreational vehicles, while still protecting GECC's rights. Pet. App. 98. The parties and their counsel did meet briefly the following morning, but petitioners' counsel terminated the meeting, stating essentially that the TRO had already, in the few hours it had been in existence, effectively put petitioners out of business. Tr. 390-392. Accordingly, no modification was pursued. Pet. App. 99.

Negotiation having failed, GECC's counsel proceeded to seek expedited discovery in order to be prepared for the scheduled January 19 hearing. However, Thomas's counsel declined to engage in expedited discovery. As a result, by January 14, 1988 the key witnesses had not been deposed and Thomas had yet to turn over the critical documents to GECC. Pet. App. 36-47, 48 (transcript of Jan. 14, 1988 hearing). On that day, the court held a hearing to resolve the discovery dispute. At the hearing, Thomas's counsel continued to oppose expedited discovery, insisting that he receive the full 30-day notice period for depositions (see Or. R. Civ. P. 39.A, 7.C(2)) and 45-day period for responding to document requests (see Or. R. Civ. P. 43.B) provided under Oregon law. Pet. App. 48-49. As a result, GECC moved for a postponement of the show-cause hearing because petitioners' refusal to provide any discovery made the scheduled January 19 date infeasible.

The court ordered reciprocal discovery on an expedited basis and granted a postponement of the hearing, in part because of the delay in conducting discovery and in part

because of some unanticipated changes in the court's own schedule. Pet. App. 59-61. After the parties conferred with the docket clerk regarding dates that were convenient to all parties and the court, the hearing was rescheduled to February 23, 1988.

On that date, the parties stipulated to the continuation of the TRO as to specified units. Pet. App. 64-69.[4] The agreement permitted, but did not require, GECC to repossess and dispose of most of the specified units and to apply the proceeds against the debt those units secured. *Id.* at 67. The agreement also permitted other creditors to repossess vehicles that they had financed and that initially had been subject to the restraining order. *Id.* at 66. Finally, the agreement provided that petitioners did not waive their claims for conversion, wrongful restraint, and commercially unreasonable sale or disposition of the collateral. *Id.* at 68-69.

F. The Decisions Below

On April 4, 1989, the parties went to trial on GECC's claims against petitioners and six counterclaims by petitioners against GECC. The six counterclaims, as characterized in petitioners' amended answer, were: (1) breach of contract; (2) trespass of chattels; (3) conversion; (4) abuse of civil process; (5) declaratory judgment (that GECC's disposition of the collateral was com-

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[4] The key provision of the order embodying the stipulation is paragraph 5, which provides:

> The provisions of the Temporary Restraining Order and Order to Show Cause herein shall continue *in effect as to all of the recreational vehicle units listed* in Exhibit 1 attached hereto and incorporated herein by reference as if fully set forth, until such time as the same have been repossessed by or on behalf of plaintiff or until further order of this court.

The italicized portion appears to have been inadvertently omitted from petitioners' Appendix.

mercially unreasonable); and (6) accounting. None of the six counterclaims in the amended answer invoked 42 U.S.C. § 1983, the federal Constitution generally, or the Due Process Clause of the Fourteenth Amendment in particular. Nor did the counterclaims demand relief, even under state law, on the basis of the delay in holding the show-cause hearing.

Following trial, the court ruled in favor of GECC on its claims against petitioners, finding Thomas "in default" under the IFA. Accordingly it held that GECC was "entitled to relief pursuant to its prayer for foreclosure." Pet. App. 102. Because the trial court found that Thomas was "in default" and that GECC "was entitled to relief pursuant to its prayer for foreclosure," it is plain that petitioners suffered no harm as a result of the delay in holding the show-cause hearing.

The court then proceeded to reject each of petitioners' substantive counterclaims.[5] The court rejected the breach of contract claim out of hand. Pet. App. 103. It rejected the conversion and trespass claims as unsupported by the evidence. *Id.* at 102. It also held, "as a matter of [Oregon] law," that the evidence did not support an abuse of process claim. *Id.* at 104. Citing two Oregon Supreme Court decisions, it explained that the evidence "establishes neither an ulterior purpose nor a willful act in the use of process not proper in the regular conduct of the proceeding." *Ibid.* Finally, the court found no merit in petitioners' request for a declaration that GECC's disposition of the collateral was commercially unreasonable. *Id.* at 105-106.

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[5] On the accounting counterclaim, the court held that petitioners were entitled to $5,939.91, but stayed its judgment because that entire amount was likely to be more than offset by the amount of attorneys' fees and costs to be awarded to GECC. Pet. App. 106.

Petitioners appealed to the Oregon Court of Appeals, contending, *inter alia*, that the timing of the show-cause hearing violated the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. GECC pointed out that this issue had not been timely raised before the trial court. The court of appeals subsequently affirmed the trial court's judgment in all respects without written opinion.

Petitioners then sought review in the Oregon Supreme Court. Again, they attempted to raise a federal due process challenge to the timing of the hearing, and again GECC pointed out that that claim had not been preserved in the trial court. The Oregon Supreme Court denied review.

REASONS FOR DENYING THE PETITION

I. PETITIONERS DID NOT TIMELY RAISE, AND THE STATE COURTS DID NOT DECIDE, THE FEDERAL DUE PROCESS ISSUE PRESENTED HERE

"It is a long-settled rule that the jurisdiction of this Court to re-examine the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system." *Webb* v. *Webb*, 451 U.S. 493, 496-497 (1981).[6] To effectuate this ex-

[6] The policies underlying this settled jurisdictional principle are well understood. First, if the federal issues have not been properly raised in the state courts, "the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind." Second, principles of federalism mandate "that state courts be given the first opportunity to consider the applicability of state statutes in light of [federal] constitutional challenge, since the statutes may be construed in a way which saves their constitutionality." Finally, if it had been clearly presented below, the federal issue might have "be[en] blocked" by the state courts on an adequate and independent

tremely important jurisdictional rule, this Court's Rule 14.1(h) requires that petitions seeking review of state court judgments contain an express statement of how and when the federal issue was raised and resolved in the state courts.[7] Petitioners have wholly failed to comply with the requirements of Rule 14.1(h). Nowhere in their statement of the case do they specify the stage in the proceedings at which they first raised the federal question presented here. Nor do they state "the method or manner of raising" that question. The reason is that they did *not* raise a due process challenge to the timing of the show-cause hearing until *after* trial. In Oregon, that is clearly too late. See Or. R. App. P. 5.45(2); *Douglas Nat'l Bank* v. *Becker*, 102 Or. App. 143, 146, 792 P.2d 1246, 1248 (1990).

None of petitioners' counterclaims even hinted at a federal issue; indeed all were predicated upon principles of state law. Moreover, none of the counterclaims even remotely suggested that it was the *timing* of the show-cause hearing—as opposed to the issuance of the TRO in the first place or other actions of GECC not at issue here—that petitioners were contesting. For example, the

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state ground, thereby rendering review by this Court unnecessary. *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969).

[7] Specifically, the Rule provides, in relevant part:

> If review of a judgment of a state court is sought, the statement of the case shall * * * specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears * * * as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

critical allegation in the trespass counterclaim was that "the [petitioners] were entitled to immediate possession of the units and/or keys to the units * * *. [GECC and/or its employees] took the keys to units numbered 1-51 with intent to interfere with the [petitioners'] right to possession of said units and/or keys to said units." Defendants' Amended Answer ¶ 60. Similarly, the core allegation in the conversion counterclaim was that "the [petitioners] maintain an ownership interest in [enumerated units] * * *. [GECC and/or its employees] took the keys to said units with intent to permanently deprive [petitioners] of their ownership interest and right to immediate possession of said units." *Id.* ¶ 63. Finally, the central allegation for the abuse of process counterclaim was:

> [GECC] obtained [the] temporary restraining order without a lawful basis * * *. [GECC's] actions in obtaining this restraining order without a lawful basis were willful and [were] not proper in the regular conduct of such proceedings; and was * * * a form of coercion to obtain a collateral advantage not properly included in these proceedings, and was done with the ulterior purpose of attempting to pressure or coerce [petitioners] into waiving any claims against [GECC] for its improper conduct * * *.

Id. ¶ 66.

Not surprisingly, in view of the fact that the counterclaims did not contest the timing of the hearing and gave no indication that petitioners were invoking the Due Process Clause of the Fourteenth Amendment, the trial court rejected the counterclaims without even mentioning, let alone resolving, the federal constitutional issue presented here. Indeed, the court's findings of fact and conclusions of law focused expressly and exclusively on state law. For example, in rejecting the abuse of process claim (which is the only one of petitioners' counterclaims that even arguably approaches the issue raised here), the court concluded:

> The evidence presented does not, as a matter of law, constitute a claim for abuse of process. It establishes neither an ulterior purpose nor a willful act in the use of the process not proper in the regular conduct of the proceeding. *Kelly v. McBarron*, 258 Or 149, 154 (1971); *Larson v. Credit Bureau*, 279 Or 405 (1977).

Pet. App. 104. So plain is it that no federal constitutional challenge to the timing of the show-cause hearing was timely raised or decided in the trial court that the court of appeals affirmed the trial court's judgment without even issuing an opinion. When the state courts have not expressly ruled on a federal constitutional claim, "it will be assumed that the omission was due to want of proper presentation in the state courts, unless the [petitioner] can affirmatively show the contrary." *Street* v. *New York*, 394 U.S. 576, 582 (1969). See, *e.g.*, *Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 181 n.3 (1983) (concluding that this Court lacked jurisdiction where state's highest court did not address federal claim, and an examination of the trial court's opinion revealed that that court had not decided the issue).

Because petitioners did not timely raise, and the state courts did not resolve, the federal due process issue presented here, the petition for certiorari must be denied.

II. PETITIONERS' PROCEDURAL DUE PROCESS CHALLENGE TO THE TIMING OF THE SHOW-CAUSE HEARING IS WHOLLY INSUBSTANTIAL.

This Court has indicated that when, as here, state law permits the *ex parte* issuance of a prejudgment remedy against a debtor, due process generally requires that the debtor be given an "early opportunity to put the creditor to his proof." *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600, 609 (1974).[8] The gist of petitioners' constitutional claim

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[8] Some kinds of prejudgment remedies are so onerous to the party against whom they are invoked that only a pre-

is that Or. R. Civ. P. 83(G)(1) violates due process because, *as applied in this case*, it prevented them from having "an early opportunity" to put GECC to its proof.

This Court has not had occasion to determine the amount of time within which a post-deprivation hearing must occur in order for the prejudgment remedy procedure to pass constitutional muster, but the present case is certainly the wrong vehicle in which to begin that necessarily case-by-case inquiry. See generally *Mitchell*, 416 U.S. at 610 (this Court will "[c]onsider[] the [State's] procedure as a whole" in determining whether "the State has reached a constitutional accommodation of the respective interests of [debtor and creditor]"). From the very moment they were aware that GECC would seek a TRO, petitioners and their counsel engaged in a course of conduct that was squarely inconsistent with their present assertion that they wanted an immediate hearing.

First, petitioners' counsel was afforded the opportunity to appear in court when the request for TRO was pre-

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remedy hearing will satisfy due process. See, *e.g.*, *Connecticut* v. *Doehr*, 111 S. Ct. 2105 (1991) (provision permitting prejudgment attachment of tort defendant's property); *Fuentes* v. *Shevin*, 407 U.S. 67 (1972) (prejudgment replevin statute); *Sniadach* v. *Family Fin. Corp.*, 395 U.S. 337 (1969) (prejudgment garnishment procedure). However, when, as here, the creditor has a property right in the property at issue and the debtor's continued unfettered control over the property might serve to permanently deprive the creditor of its property right, a pre-deprivation hearing is not necessary as long as other safeguards, including a timely post-deprivation hearing, are available. See *Mitchell*, 416 U.S. at 609; see also *Doehr*, 111 S. Ct. at 2115. Petitioners do not deny that Oregon affords the other kinds of safeguards necessary to ensure that a state's prejudgment remedy procedure comports with due process—*e.g.*, the requirement that the moving party post a bond and the establishment of a judge (rather than a sheriff or notary) as decisionmaker. See *Mitchell*, 416 U.S. at 616, 620 n.14; *Doehr*, 111 S. Ct. at 2116-2119 (plurality opinion).

sented, but passed it up in order to attend an aerobics class. Had he appeared at that hearing or sent a replacement, he could have contested the allegations upon which the petition for TRO was based as well as GECC's request to hold the show-cause hearing more than seven days after issuance of the TRO.

Second, when presented the next morning with an opportunity to negotiate a modification of the TRO that would have enabled petitioners to continue selling recreational vehicles, while at the same time protecting GECC's security interest,[9] petitioners and their counsel declined to negotiate, stating that the TRO already (in less than 24 hours) had put them out of business. If petitioners really were concerned that postponing the hearing would cause them harm, they should have taken the opportunity that was presented to them to mitigate the effects of the TRO.

Third, even after they declined to engage in negotiations to ameliorate the effects of the TRO, petitioners retained the option of filing a motion informing the court that the delay was harming them and requesting an expedited hearing. They never did so.[10]

Fourth, by refusing to engage in expedited discovery, petitioners themselves directly contributed to more than half of the delay they challenge here. GECC attempted

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[9] For example, the TRO could have been modified to permit petitioners to sell vehicles on the condition that payment be made either directly to GECC or into an escrow account that would be applied against petitioners' debt.

[10] By failing to try this route, petitioners have deprived the Oregon courts of the opportunity to interpret their own procedures; they instead ask this Court to *assume* that the Oregon courts would have selected an interpretation that would have rendered those procedures subject to constitutional question. This Court typically declines such invitations. See *Cardinale*, 394 U.S. at 439.

to obtain the necessary documents and take the necessary depositions two weeks in advance of the original hearing date, but petitioners insisted that they be given the full 45-day period for responding to document requests and 30-day notice period for depositions that are provided for under Oregon law. They gambled that by refusing to engage in expedited discovery they could force GECC into a hearing for which it was not prepared. They now are hardly in a position to complain about the court's decision to reschedule the hearing so that discovery could be completed.

Finally, after all was said and done, petitioners voluntarily stipulated to a continuation of the TRO well beyond the scheduled February 23 hearing date. That act is squarely inconsistent with their present assertion that they desired an immediate hearing.

Thus, the delays in this case and the harm (if any) stemming from them are as much a product of the petitioners' strategic behavior as anything else. This plainly is the wrong case in which to make new law on the issue of how prompt a post-deprivation hearing must be in order to comport with due process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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